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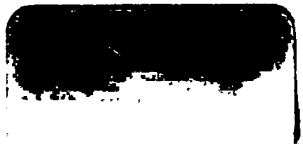

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Transcript Appeals.

Vol. 3.

THE

FILE OF OPINIONS

IN CASES ARGUED BEFORE THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

DURING THE

JUNE TERM,

1867.

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Transcript Appeals.

JUNE TERM,

1867.

THE PEOPLE, Plaintiffs in Error, *v.* RICHARD LEWIS, Defendant in Error.

Evidence of Provocation to Murder, admissible when.

Where the intent of the prisoner, who is charged with the crime of murder, remains to be proved, it is competent for the prisoner to prove that he acted upon immediate provocation, and to show what that provocation was.

A. Anthony for Plaintiffs in Error.
H. A. Nelson for Defendant.

Grover, J.—Questions of law only can in this class of cases be reviewed in this Court. The question whether the evidence justified the verdict of the jury, finding the Defendant guilty of murder in the first degree, cannot be examined here. The evidence offered as to the acts and declarations of the prisoner, after the perpetration of the crime, was properly excluded. Such acts and declarations were not admissible in his behalf. This is the settled rule, and requires no discussion. The real issue upon the trial was whether the Defendant designed to effect the death of the deceased. If he did, he was guilty of murder in the first degree; if he did not, he was not so guilty. The prisoner used no weapon; all he did to deceased was with his fists.

The prosecution proved that threats against the deceased had been made by the prisoner some time previous to the occurrence. The prisoner offered to prove, that a few minutes before he made the attack upon the deceased, he went to the house where he lived,

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and where his father's family lived, and found his sister crying, and inquired as to the cause, and was informed by her that the deceased had just been there, and called her mother and herself prostitutes, whereupon the prisoner went directly into the lot where the deceased was, and inquired of him why he had so done, and immediately struck him with his fist.

This evidence was excluded, and the prisoner's counsel excepted. It is clear that if the Defendant designed to effect the death of the deceased, this evidence had no tendency to mitigate the crime from murder to manslaughter, and was not admissible for any such purpose. But upon the question whether he did so intend, the evidence ought to have been received. The acts of the prisoner were such as not at all likely to produce death, and upon the inquiry whether such was his design, it was very important to ascertain whether he acted from deliberate malice, long entertained, or from recent provocation likely to induce such acts as the prisoner committed. In the former, the conviction that a design to effect the death of the deceased prompted the commission of the acts, would be much more readily arrived at than it would were such acts induced by a recent provocation, which would be likely to induce the prisoner to chastise the deceased. Upon this ground only, the evidence should have been received. The learned judge erred in rejecting it, and thereby leaving the jury to infer that the Defendant acted from deliberate malice, long entertained. The latter conclusion would be the necessary result of excluding the evidence. Upon this ground the prisoner was entitled to a new trial, and the judgment of the Supreme Court awarding it must be affirmed.

Many cases were cited by the counsel for the people, where similar evidence was excluded. But these were all cases where there was no doubt as to the intention of the prisoner to effect the death of the deceased, and where the only inquiry was whether, conceding such intention, the offence was murder or manslaughter. In such cases the law is well settled that the crime cannot be mitigated from murder to manslaughter by anything the prisoner may have heard from a third person. In such a case the law

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adjudges that the prisoner acted only from revenge, and this constitutes murder.

When the provocation arises in the presence of the prisoner, and the act causing death immediately follows, the inquiry is, whether the provocation was such as to cause such a frenzy, as for the time to deprive the prisoner of his reason, to an extent that he was not capable of deliberation. If so, he is guilty of manslaughter by effecting the death of the deceased. If otherwise, the crime is murder.

Judgment of the General Term should be affirmed.

Affirmed.

DAVIS, Ch.J., and HUNT, J., dissenting.

JOEL TIFFANY,
State Reporter.

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JACOB STAIGER v. JACKSON S. SCHULTZ and Others.

Costs in Equity cases, in discretion of Court giving.—Code, §§ 304, 305, 306.

In equity cases the giving or withholding of costs rests on the discretion of the Court, and that discretion this Court cannot control.

Bockes, J.—This is an appeal from the judgment of the General Term of the Court of Common Pleas of the City and County of New York, affirming the judgment of the Special Term, by which the action was discontinued, without costs. The action was in equity, to restrain the Defendants from enforcing against the Plaintiff the Act of the Legislature, passed April 14, 1866, entitled "An Act to regulate the sale of intoxicating liquors within the Metropolitan Police District of the State of New York," on the ground that the act was unconstitutional and void. The Plaintiff in his complaint demands judgment that the act alluded to be adjudged invalid, and that the Defendants be enjoined and restrained from enforcing its provisions against him.

The pretence of invalidity set forth in the complaint was determined by this Court adversely to the Plaintiff's claim, and therefore, on motion, he was permitted, by an order to that effect, to discontinue the action, without costs, and judgment of discontinuance, without costs, was entered accordingly. The Defendants protest against the order and judgment, in so far as it deprives them of the costs of the action.

It is first insisted that the Defendants were entitled to costs, as a matter of legal right, on dismissal of the complaint, or its equivalent, the discontinuance of the action; and sections 304 and 305 of the Code of Procedure are relied on in support of this position. As these sections stood prior to the amendment of 1862, no question could arise. Prior to that amendment costs were most clearly in the discretion of the Court, in equity actions. Section 304 declared that costs should be allowed to the Plaintiff upon a recovery in the cases therein specified, among which were actions of which, "according to section 54, a court of a justice of the

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peace has no jurisdiction." Section 305 provided that costs should be allowed of course to the Defendant in the actions mentioned in section 304, unless the Plaintiff was entitled to costs therein; and by section 306, in other actions costs were to be allowed or not, in the discretion of the Court. The *other actions* here alluded to embraced equity actions, in which costs were to be given or withheld, as the Court should direct. This is very plain—indeed, is conceded by all. But by the amendment of 1862, the words, "*according to section* 54," were omitted in subdivision 3 of section 304, and it is insisted that, as the section now stands, the Plaintiff is entitled to costs *in all cases* of a recovery by him, in an action of which a justice of the peace has no jurisdiction, and, as a consequence, by section 305 the Defendant must have costs *in all such cases* if the Plaintiff be not entitled to costs. This construction, however, renders meaningless the first subdivision of section 306, which declares that "in other actions costs may be allowed or not, in the discretion of the Court." It is indisputable that this paragraph embraced equity actions prior to 1862. It was introduced principally, if not solely, with a view to a fair and just imposition of the burdens of litigation according to the equities of the particular case. This right had been exercised by courts having equity powers from time immemorial, and was always deemed essential to the proper exercise of equity jurisdiction. We cannot believe that the Legislature intended to effect so great a change, in the absence of an express declaration to that effect. Had such an intention existed, it would not have been left, as we conceive, to mere construction. Especially must we so conclude when such construction renders other provisions of law nugatory.

All the provisions bearing on the subject under consideration should be read together, and should be so construed as to take effect in harmony. Governed by this rule of interpretation, the right to give or withhold costs to a party in equity cases, rests in the discretion of the Court, as declared by section 306, and such discretion it is not in the province of this Court to direct or control.

Again, it has always been the practice to permit actions to be

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discontinued in the discretion of the Court, without costs, even in suits at law, when the Defendant had obtained a discharge under the insolvent laws, and in many other cases. Such permission existed as a matter of practice, resting in the discretion of the Court, and could not be considered on appeal.

The numerous cases cited by the Appellants' counsel, showing in what instances the Court of original jurisdiction will refuse permission to discontinue without costs, have no pertinency in this Court. Those cases were proper for the consideration of the Court on the hearing of the application. They were authorities on the question of practice in that Court. But this Court has not the power to correct errors of practice in the inferior courts. We are also cited to various statutes in relation to costs, and particularly to 2 R. S. 613, § 1, which provides that a Plaintiff, on dismissing his bill or petition, in a court of equity, shall pay to the Defendant his costs, to be taxed, except in certain cases there specified. But the Code abrogated these statutory provisions, and declared when, and under what circumstances, parties were entitled to recover costs, and they can now have them in no other cases.

We are of the opinion that the order and judgment appealed from must be affirmed, but without costs of appeal.

This conclusion disposes of the appeal in Grace v. The Same Defendants.

Affirmed, without costs of appeal.

JOEL TIFFANY,
State Reporter.

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JARED W. MOSS, ADMINISTRATOR OF EDWARD A. MOSS, DECEASED, RESPONDENT, *v.* GEORGE BRISBANE, APPELLANT.

APPEAL from the Supreme Court. The action was for moneys expended and services rendered by the Plaintiff, under a written agreement with the Defendant, which provided, among other things, that the Plaintiff should take charge of certain rooms in a hotel in Buffalo, kept by the Defendant, for the sum of $90 a month, and that the Plaintiff should provide certain articles necessary for the purpose, and pay for all gas consumed in the building.

The referee found, as matter of fact, that the parties entered into the agreement alleged; that the Plaintiff rendered the stipulated services; that he furnished certain necessary articles, which the Defendant undertook and neglected to provide; and that he advanced certain moneys for the benefit of the Defendant, and for which the latter was liable. The referee directed judgment for the amount due, which was $1,646.35, with costs.

The only exception taken by the Defendant was to the admission of proof of the amount paid by the Plaintiff for gas consumed in the hotel.

The judgment was affirmed at the General Term in the Eighth District, and the Defendant appealed to this Court.

Talcott, Houghton & Clark for Appellant.

Ganson & Smith for Respondent.

PORTER, J.—The referee was right in receiving the proof to which the Defendant objected. The use of the gas was essential in conducting the business in which the parties were engaged. The Plaintiff was at liberty to make the payments and claim reimbursement from the Defendant. The appeal is without merit, and the judgment should be affirmed, with five per cent. damages for delay.

All concur.

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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ANNA M. COOK, ADMINISTRATRIX OF JOHN F. COOK, DECEASED, v. THE NEW YORK CENTRAL RAILROAD CO.

Nonsuit—Presumptions for Plaintiff—Negligence—Railroad.

On a question of nonsuit, all disputed questions of fact are to be decided in favor of the Plaintiff; and all presumptions and influences which he had a right to ask from the Jury, are to be conceded to him.

In the management of a railroad and machinery, the railroad corporation is bound to use the utmost care and vigilance to avoid the dangers attending a collision.

The party injured was required to exercise only the ordinary prudence and attention which sensible men are accustomed to give under similar circumstances.

ON the 17th of September, 1864, John F. Cook and John Van Brunt were returning from their work, in a one-horse wagon. Their course was northerly up Hamburg Street, in the city of Buffalo. While crossing the Defendants' railroad, as it passed over that street, the wagon was struck by a train of cars, which was backing toward the city of Buffalo. Both the occupants of the wagon were thrown out, and Cook was instantly killed. The Plaintiff, as his administratrix, brings this action to recover damages for such killing. On the trial at the Circuit the Plaintiff was nonsuited. The General Term of the Eighth District affirmed the judgment entered upon this nonsuit, and the Plaintiff now appeals to this Court. The facts are stated in the opinion of the Court.

John C. Strong for Appellant.

A. P. Lanning for Respondent.

HUNT, J.—Two questions were presented upon this trial. First, were the Defendants guilty of negligence on the occasion in question? Second, was the deceased free from negligence?

To justify a nonsuit, one of these questions must be held against the Plaintiff, and so clearly that there is no room for doubt. On a question of nonsuit, all disputed facts are to be

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decided in favor of the Plaintiff, and all presumptions and inferences which he had a right to ask from the jury are to be conceded to him. As we have frequently and recently held, we do not weigh or measure the evidence. That is the province of the jury. If there is evidence in favor of the Plaintiff's claim, on which the jury would have been justified in giving him a verdict, it is not for the Court to say whether it has been overbalanced or outweighed by the conflicting testimony.

(Solms v. The Rutger's Fire Ins. Co. and railroad cases cited, post.)

It appeared in evidence that the train approached the crossing in question by a curve, and that the view in the direction from which it came was cut off by houses and by a high fence.

It appeared that the deceased and his companion, who is now also dead, were sober, steady men, and that they were sober on the evening in question. They approached the crossing slowly, in the dusk of the evening, and, as it appeared by the evidence of five witnesses, there was no flagman visible at the station, and no warning was given that it was not safe to cross, although a flagman was regularly stationed at that point for the purpose of preventing the passage, when it was unsafe to cross. It appeared by the evidence of four witnesses that no bell was rung upon the approaching train, and that no whistle was sounded from it until the collision took place. An ordinance of the city of Buffalo was introduced in evidence, by which trains were prohibited from passing this point at a rate of speed greater than that of six miles per hour. It was proved by several witnesses that this train was crossing at a rate of speed equal to eight or ten miles per hour.

The Defendants, on the other hand, proved by the fireman of the train that the train was crossing at a speed not exceeding five miles per hour, that the whistle was blown twice, and that the bell was rung as they crossed the street. He further testified that Scanlin was the regular flagman at this point, but that, on this occasion, one Sullivan stood near the track, and about ten or twelve feet from the shanty on Hamburg Street. Another

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fireman testified to the same facts, except that he testified that he did not see a flagman there; that he did see a cripple there, but that he did not know Sullivan. The first of these firemen stated that he remembered that they rang the bell at the crossing, because they always did ring the bell at such a crossing. The other testified that he fixed the rate of speed at which they crossed, from the fact that they always came slowly around the curve, and he fixed it on this occasion from that usual way. The conductor was also sworn, and he testified that he discovered the wagon on the track, and whistled, or signalled to brake down. "The man was stopped there, but he started again, and I immediately hallooed to him to hold on, and then I ran to the second car, and I had not more than got there than they blowed the second whistle . . . ; the men came to a full stop when they saw the train, but they jerked the lines again and started, and as quick as I saw them I hallooed, because I saw they could not cross safely; I hallooed to them to hold on, and gave a signal to brake and stop the engine. With reference to Hamburg Street, the men were in the middle of the road; I think the fore part of the horse was pretty near on the southern part of the track; the cars are thirty feet in length." On his cross-examination he said: "When I first saw them they were driving on the track, and had stopped; I was within four cars' length of Hamburg Street. When I first saw them they were driving up the track; I told them to stop; I was four cars' length from them; they stopped on the south track; the wagon was in the centre of that track when I first noticed them." Daniel Sullivan testified that Scanlin was the flagman at this point, and that, at his request, he held his flag for him while he went to his supper, on the occasion in question; that he saw the horse and wagon coming up the street, and saw the train approaching, and, waving his flag under the horse's nose, stopped the wagon for about ten minutes; that the man said the horse should go through, whipped him up, and he went on the track. Thomas Smith and Rosina Smith corroborated Sullivan in the most important portions of his testimony. Other witnesses were called to discredit Sullivan's

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evidence, one of whom testified that Sullivan had said to her that he knew nothing about the accident, that he was in the shanty, and that he knew nothing about it.

The rule is quite well settled, that in the management of their road and machinery, a railroad corporation is bound to use the utmost care and vigilance, to avoid the dangers attending a collision. It is equally well settled, that the freedom from negligence which is required of a Plaintiff, involves only that ordinary prudence and attention which sensible men are accustomed to give in similar cases.

Perfect composure in danger, entire self-possession, and an accurate decision upon the evident course to be adopted on the emergency, are not required.

The recent elaborate discussions in Ernst *v.* The Hudson R. R. Co. (35 N. Y. 9), Beisiegal *v.* The N. Y. Central (34 N. Y. R. 622), Mackay *v.* The N. Y. Central (35 N. Y. R. 75), Brown *v.* The N. Y. Central (34 N. Y. R. 405), render it unnecessary to re-examine either the authorities or the principles upon which this case should be decided. Upon those cases the question upon each of the points I have mentioned should have been submitted to the jury, and their decision would have been conclusive. Indeed, upon the evidence of the Defendants' conductor himself, I think it was a case for the jury.

It was for them to decide upon the conflicting evidence before them as to the Defendants' negligence. It was for them also to draw the conclusions whether the Plaintiff was in fault; whether and how he could have escaped the imminent danger that pressed him; and whether he heard or understood the directions or signals that were given to him.

I think there should be a new trial, with costs to abide the event.

All concur, except DAVIES, Ch.J., and GROVER.

GROVER, J. (dissenting).—The only exception as to the admissibility of evidence taken was, that of the Plaintiff to the rejection of testimony showing what Van Brunt swore to in

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relation to the transaction before the coroner's inquest. Van Brunt was in the wagon with the Plaintiff's intestate, and driving at the time of the collision. Van Brunt was dead at the time of the trial, and the Defendant had counsel before the inquest. It is settled in civil actions that, when a witness has been sworn upon a previous trial between the same parties or their privies, upon the same issue, and has died before the pending trial, proof of what such witness swore to upon the former trial is competent. This is the extent of the rule. The evidence offered in the present case does not come within the principle. Here there was no cause pending between these parties at the time Van Brunt was sworn. Neither party could in any way be affected by any result of the inquest, nor was such inquest admissible in evidence for or against either party in this case. Although in some ancient cases it has been held that such testimony was admissible upon the trial of an indictment, there is no precedent for admitting it in civil suits. Neither the parties or issue is the same. The evidence was properly rejected.

The more material question arises upon the exception of the Plaintiff to the nonsuit ordered by the Court. This presents the question, first, whether there was such a failure of proof showing negligence in the Defendant as that a verdict finding such negligence would be set aside; and second, whether a verdict exonerating the Plaintiff's intestate from negligence would be so much against the weight of evidence as that it would not be permitted to stand.

A determination of either of these propositions in favor of the Defendant will sustain the nonsuit (Wilds v. The Hudson River R. R. Co. 24 N. Y. 431; Johnson v. Same, 20 N. Y. 73). The same rule has been held by this Court in other cases, and in this respect (if in any) these cases have not been overruled.

The negligence imputed to the Defendant is, that there was no flagman at this crossing at the time of the collision; 2d, that the train was running faster than permitted by the ordinance of the city of Buffalo; and 3d, that the bell was not rung. As to the first question, it was proved that there was usually a flag-

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man kept by the Defendant at this crossing. The evidence as to his being there at the time of the collision in question was conflicting, and as to that I think it presented a fair question for the jury in that respect. But there was no law for making it the duty of the Defendant to keep a flagman there. In the absence of such law I do not think negligence can be imputed to the Defendant for the omission. Crossing a railroad in the country where there is no flagman is equally dangerous as it is to cross in the city in the like absence, although the number crossing may be much less.

The law has imposed upon railroad companies the duty of making such signals and giving such warnings as it deems adequate to the security of the public, and neither courts nor juries have any right arbitrarily to impose others. If courts or juries are authorized to impute negligence from a failure to keep flagmen at any particular station, no determinate rule can be prescribed excusing them from so keeping them at others. The amount of travel at the crossings varies greatly at particular seasons and on particular occasions. As above remarked, there is as much danger encountered by each person crossing the track where there is but one hundred crossing in a day as there is where a thousand cross. While the presence of flagmen may to some extent reduce the danger, it would be still more reduced by closing a gate at the crossing while trains were passing, as is done in some countries in Europe. No one insists that they are bound to do the latter.

The decided weight of the evidence is, that the train was not running six miles an hour, the rate permitted by the ordinance of the city. Two or three witnesses testify it was running faster than usual, but it is evident that their observation was such as scarcely authorized them to speak upon this point; while those on and in charge of the train testify positively that it was running very slow—not five miles an hour—and the short distance within which the train was stopped, after the signal so to do, demonstrates that these latter witnesses were correct.

Some four witnesses testified that they did not hear the bell

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ring; not one of them testify that they listened for the purpose of hearing, or were paying any attention to whether it was ringing or not. Three witnesses swear positively that the bell was ringing. No conflict was presented by this evidence. Testimony of a witness that he did not hear the bell ring is no evidence at all, unless he testifies that his attention was directed to the matter. It is a case where affirmative evidence is to prevail against negative, for the reason that the former knows the fact, and the latter does not know it. These latter testify honestly that they did not hear, although the bell was ringing, while the former are guilty of perjury, unless the fact was as stated by them.

I think the evidence failed to show negligence in the Defendant or its employees.

Upon the question of negligence in the Plaintiff's intestate, it is settled that the negligence of Van Brunt, the driver with whom he was riding, was imputable to him (Brown v. N. Y. C. R. R. 32 N. Y. 597).

The evidence showed that the approaching train might have been seen by persons in the wagon while approaching the track, so as to have avoided the collision by looking up and down. It is true that there were some buildings that prevented a view of the entire track, but the evidence shows that sufficient could be seen by attention, while passing along in the wagon, to have prevented the collision. It is conceded that, if the intestate's negligence contributed to the injury received, he cannot recover, although the Defendant was guilty of negligence. In Ernst v. The Hudson R. R. R. (32 Howard, 61), it was remarked in the opinion of the learned judge in this Court, in substance, that if the traveller, upon approaching a crossing, does not hear the bell ring, he may assume there is no train within eighty rods, and that he is not, therefore, guilty of negligence in going on the track, although, by looking, he could see a train approaching so near that it was dangerous so to do. The reason upon which the remark is based is, that the law makes it the duty of those in charge of the train to ring the bell continuously within that

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distance of the crossing, or in default blow the whistle, and that a failure to do either is an assurance that may be relied on that there is no approaching train within the prescribed distance. Similar remarks are found in the opinions in several other cases in this Court, but in none of the cases does the point appear to have been so adjusted. In Wilds v. The Hudson R. R. R. (supra) the direct contrary is said in the opinion, and in several other cases in this Court. So that, upon this point, there is a conflict in the views of learned judges. All agree that the party crossing the track must use ordinary care, or he is guilty of negligence that will prevent his recovering for an injury, although the company may be guilty of negligence.

The inquiry then is reduced to this: Whether it is ordinary care for one to venture upon a railroad track, although no bell may be ringing or whistle blowing to advertise an approaching train, without looking, when the track is visible, to see whether there is such train. Care is imposed, and must be exercised. Is this performed by simply listening for the bell or whistle, when, by the use of the eye, without trouble or inconvenience, the real condition can readily be ascertained. I think it borders upon rashness to go ahead, omitting this easily available means of avoiding danger. It is said, Will you require this vigilance in behalf of a wrongdoer? My answer is, that the omission to look under such circumstances makes the party guilty thereof a wrongdoer, and, if injury arises to either, it is the result of the acts of two wrongdoers. If either is injured in consequence of the wrongful acts of both, the law will not allow either to recover.

It is said that a regard for human life requires that railroad companies should be held strictly to the performance of their duty in giving the requisite signals at crossings. To this I agree. The same regard requires that all persons at such crossings, knowing the great danger inseparable from collisions, should exercise their senses of sight and hearing, in order to avail them. To omit this, and heedlessly rush upon a track at any time, is a wanton exposure that no prudent person will be guilty of. To rely blindly upon the strict performance by others of their legal or

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moral duties, in matters seriously affecting life and limb, or any important interest, is not the course of prudent, cautious men, and, when this has been done, the party suffering an injury therefrom should attribute it, at least in part, to his own want of care. Human nature is too imperfect to render such reliance safe.

The law evinces its regard for human life and safety, not by awarding compensation for injuries sustained by the mutual carelessness of parties, but by punishing criminally those through whose neglect the injury has been inflicted.

In all cases where death has been caused by the neglect of those in charge of trains to give the signals required by law, those whose duty it was to give them may be punished criminally for the homicide.

To this charge the fact that the negligence of the deceased had contributed to his death, would constitute no defence. One conviction upon such a charge, would go further in securing a performance of duty by railroad employees than many recoveries in civil actions. It is not, therefore, necessary to innovate upon settled legal principles to protect the public.

The only remaining question is, whether it is the duty of the Court to submit the question to the jury as one of fact, or to dispose of it as one of law. It is the legal right of parties to have all questions of fact determined by the jury. It is equally their right to require the Court to determine all questions of law. An application of these rules requires the judge, when there is a doubt whether the party, by looking, could have seen, or by listening could have heard, the train in time to have avoided the danger, to submit these questions to the jury; but, when the proof clearly establishes the affirmative of these propositions, or either of them, the only question is, whether it is negligence to go upon the track without looking or listening. This I conceive to be clearly a question of law, to be determined by the Court. In this way only can there be any uniform rule. It it said that it should be submitted to the jury to determine whether people generally were not in the habit of so doing, with the instruction that if they were it was not the omission of ordinary care so to do.

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Who ever heard of any testimony being offered upon such an issue? Is it said the jury are to determine from their own knowledge? The answer to this is, they have no knowledge, except their individual experience, and many juries rarely cross a railroad. Prudent juries, exercising care, would determine the question one way, while those of a different character and habit would determine it the other.

I think, when it appears that, by looking, the train could have been seen, and the party has gone upon the track, negligence has been conclusively shown, and the Court should so pronounce.

My conclusion, therefore, is, that the nonsuit was properly granted, upon the second ground, and that the judgment should be affirmed.

Reversed, and new trial ordered.

JOEL TIFFANY,
State Reporter.

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JAMES ORTON ET AL. APPELLANTS, v. LINA ORTON ET AL., RESPONDENTS.

Legacy, what constitutes—Dower—Proportional Deductions.

Every bequest of personal property is a legacy, including as well those made in lieu of dower, or in satisfaction of an indebtedness, as those which are wholly gratuitous.

Where the testator provides in his will that, in case his estate should not be sufficient to pay the legacies, the deficit is to be deducted in proportion to the sums given to each, he makes the amount given to the widow in lieu of dower to depend upon the sufficiency of the estate to pay the legacies given. The same principle applies also where the legacies are to be increased by a surplus in the estate.

PARKER, J.—The Appellants and all of the Respondents, except Lina Orton, are heirs-at-law of Henry T. Orton, deceased, and legatees under his last will and testament. Lina Orton is his widow.

By his will the said Henry T. Orton gives to his wife, Lina Orton, in lieu of dower, $25,000. He also gives her the use of his dwelling-house, with the building and lands adjoining, during her natural life. He also gave her, absolutely, all his farming utensils, household furniture, and stoves. He then disposes, by devise, of certain real estate which he had in the State of Connecticut, and gives legacies of various sums, respectively, to the Appellants and Respondents, except the said Lina Orton. The will then proceeds as follows: "My lot of land in the town of Washington, Dutchess County, and State of New York, containing about twelve acres, I direct to be sold, and the sum realized therefrom to be divided among all my heirs in proportion to the sums given to each at the death of my wife. I direct the surviving executor or executors to sell my house and lot in the town of Washington, and divide the sum realized therefrom among the surviving legatees, or their children, in proportion to the legacies of each. Should my estate not be sufficient to pay the amount of the within named legacies, the deficit shall be deducted therefrom

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in proportion to the sums given to each; if there be a surplus, it shall be divided to each in proportion to the sums given, and subject to the same conditions." The Defendants, Lina Orton, Sarah E. Brace, and his nephew, Samuel De Graff Orton, were appointed executors of the will, and authorized, for the purpose of paying his debts and legacies, to sell or otherwise dispose of his property, real and personal, as they should deem best.

Upon the final settlement of the executors before the surrogate of Dutchess, after paying all debts and legacies, there was found to be a surplus amounting to $41,912.75. This included the sum realized from the sale of the twelve-acre lot in the town of Washington, which the executors were directed by the will to sell and divide among all the heirs of the testator in proportion to the sums given to each, which sum was $840.

In the distribution of this surplus, under the will, the surrogate gave to the Defendant, Lina Orton, the widow of the testator, the sum of $20,852.50, being, or intended as, the proportion thereof to which she is entitled under the direction that the surplus "shall be divided to each in proportion to the sum given" each by the will, and counting the $25,000 given her in lieu of dower as the "sum given" to her, mentioned in that clause.

The present Appellants, being dissatisfied with this allowance to the widow, appealed to the Supreme Court, where the decree was modified in so far as it gave the widow any portion of the proceeds of the real estate, and the sum of $417.92 was deducted from the said sum awarded to her, and as to the residue of said sum, the sum of $20,434.58, it was adjudged that she was entitled to retain the same.

From this latter part of the judgment the appeal to this Court is taken.

The question is, whether the widow, by virtue of the $25,000 given her in lieu of dower, is entitled, under the clause in the will in respect to the division of the surplus, to share in such surplus. The Appellants insist that she is not, on the ground that the testator intended, as shown by the will, to divide the surplus among the *legatees* in proportion to their *legacies*, and that

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a bequest in lieu of dower is not a legacy, and the widow, in respect to such bequest, not a legatee. Notwithstanding the bequest to the wife was declared to be in lieu of dower, it is incorrect to say that it was not a legacy. Such it was in legal, as well as common parlance, and it is constantly called by that name in the books (2 Williams on Exrs. 1169, 1170; 2 Redfield on Wills, 553, n. 25; 1 Roper on Legacies, 297, 432; Wake v. Wake, 1 Ves. Jr. 335; Williamson v. Williamson, 6 Paige, 298). Every bequest of personal property is a legacy, including as well those made in lieu of dower and in satisfaction of an indebtedness as those which are wholly gratuitous. The circumstance whether gratuitous or not, does not enter into consideration in the definition. Thus, in Jacob's Law Dictionary, it is defined to be "a bequest or gift of goods and chattels by will or testament." In Bacon's Abridgment a legacy is defined "a gift or bequest of a particular thing by testament" (Bac. tit. Legacy). "The word devise is specially appropriated to a gift of lands, and the word legacy to a gift of chattels" (id. note); and when it is said that a legacy is a gift of chattel, the word gift is not limited in its meaning to a gratuity, but has the more extended signification, the primary one given by Worcester in his dictionary, "a thing given, either as a gratuity or as a recompense." Thus the Chancellor, in Williamson v. Williamson (6 Paige, 305), uses this language: "For this reason the *legacy* of the wife, *given* in lieu of dower, does not abate ratably with others, if the fund is insufficient to satisfy all."

The expression, "the within named legacies," then, as used in the clause of the will disposing of the surplus, clearly includes the bequest to the widow, and the language of that clause makes that bequest, equally with the others, subject to abatement in case of deficiency to pay the whole, and entitled to its proportionate increase in case of a surplus.

No doubt the rule is that a legacy, in lieu of dower, is to be preferred, in case of a deficiency of assets, to other general legacies (Williamson v. Williamson, supra). But this rule is for cases where the will does not provide a different one. The be-

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quest to the wife, in lieu of dower, may be made subject to any condition which the testator chooses to impose upon it; for the wife is not obliged to give up her dower in exchange for it, unless she so elects. If it is encumbered by a condition, the acceptance of it is subject to such condition. In the case at bar, when the testator said, "should my estate not be sufficient to pay the *amount of the within named legacies*, the deficit shall be deducted therefrom in proportion to the sums given to each," he made the amount of the legacy to his wife conditioned upon the sufficiency of his estate to pay all the legacies in full, and her election was made in view of that condition; and when he said further, "if there be a surplus, it shall be *divided* to *each*, in proportion to the sums given, and subject to the same conditions," he gave to this legacy the condition that it should be increased from the surplus, in the same proportion that it was subject to be diminished by the deficiency. Such is the clear and explicit language of the clause in question, and there is nothing in the other parts of the will or in the circumstances of the case to cast a doubt upon this interpretation. It is manifest from the case that the sum named as the legacy in lieu of dower very far exceeds the value of the dower, the estate consisting principally of personal property. The aggregate amount of the legacies, including that given to the wife, is $50,100. It seems, then, that the leading instruction of the testator, as shown by the will, was to give his wife about one-half of his personal estate; and as there was scarcely any indebtedness, and the widow was an executrix, it was seen that she would have no difficulty in making her election, within a year, between her dower and the provision made by the will in lieu thereof, even though that provision should be subject to a pro rata reduction with the other legacies, in case of a deficiency; and upon the corresponding increase in case of a surplus, the ratio would be preserved, and the leading intent carried out.

The proceeds of the twelve-acre lot mentioned it is manifest he did not intend the widow to share in, but that does not militate against the construction above adopted. In regard to the specific real estate mentioned in the will, his scheme of distribu-

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tion was different from that adopted for the personal estate. His Connecticut lands he gave to one brother and two sisters, the homestead to his wife for life, remainder to the other legatees who should survive her, or their children, in proportion to their legacies, and this twelve-acre lot to his heirs, in the same proportion. The absence here of the *ratio* appearing in the distribution of his personal estate does not disprove the intent indicated by the existence of that *ratio* in that distribution, nor tend to show that he did not mean to include the wife's legacy among those subject to be reduced by a deficiency and increased by a surplus.

It is said that the great disproportion which this construction gives the widow is a reason for not adopting it. As there were no children, and no representatives of any, if there had been no will the widow would have been entitled to one-half of the personal estate. It would seem, then, that a construction of the will which gives her only half does not give her an undue proportion. But this objection also denies the intent of the testator to give her half. We are to assume, from the fact that he provided for the event both of a deficiency and a surplus, that he supposed the legacies which he gave might exhaust the whole of his estate. Supposing this, he distinctly gives his wife $25,000, and all the other legatees together $25,100. This he intended. He consequently intended, if his estate—not otherwise disposed of—should just cover these legacies, that the *ratio* thus indicated should be the *ratio* of distribution between his wife and the other legatees in the aggregate. He meant, in case of a deficit or a surplus, to keep up the *ratio* established by a comparison of his various legacies, for all deductions are to be made in *proportion to the sums given to each*, and all additions from the surplus in the same proportion. I can see no reason for excepting the sum given to the widow from the operation of this direction, and, as no intent to exclude it appears, it is necessary to give the language and its ordinary meaning legitimate effect, and that will clearly include the legacy to the widow as one of the "within named legacies" which are to be diminished in case of a deficiency, and increased in case of a surplus.

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His making the portion of the surplus divided to each subject to the same conditions imposed upon the original legacies affords no reason for supposing that he did not intend to include the widow in this division. If it is conceived that the legacy given to her in lieu of dower is given without condition, the same is true of the legacies given to his brother James Orton, his nephew Samuel De Graff Orton, and his niece Eliza Stewart, and the same consequence would result to them. But this division to each is not dependent upon the existence of a condition annexed to the prior legacies. When the legacy has such condition, the sum added from the surplus is to be subject to the same condition, is all that is meant by the language of this bequest.

I think the judgment of the Supreme Court clearly right, and that it should be affirmed.

Concurring, PORTER, DAVIES, GROVER, and WRIGHT.

HUNT, J., was for reversal.

BOCKES was absent.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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NEW YORK LIFE INSURANCE & TRUST CO., APPELLANTS, v. ISAAC COVERT AND OTHERS, RESPONDENTS.

Title to Real Estate—Mortgage—Lapse of Time—Presumption repelled.

A purchaser, finding a mortgage upon the land purchased, cannot rely upon the presumption arising from the lapse of twenty years, but must ascertain if anything has been done to repel the presumption arising from mere lapse of time. A rule holding the lien of a mortgage discharged after the lapse of twenty years from its becoming due, notwithstanding the mortgagor had paid punctually every year the annual interest, because of a conveyance of the mortgaged premises by the mortgagor without the knowledge of the mortgagee, would be unjust. The registry of such a deed is no notice to the mortgagee.

W. Betts for Appellants.
E. G. Lapham for Respondents.

DAVIES, CH.J.—The complaint in this action was filed in August, 1853, and the suit was instituted to foreclose a mortgage dated May 1, 1829, to secure the sum of $1,400, in two annual payments. The bond and mortgage were executed by William Cornell to Daniel A. Ammerman, and by several mesne assignments were vested in the Plaintiffs. The last payment made by Cornell on the bond, while owner of the premises, was on the 26th of May, 1830. Cornell continued in possession of the premises until 1838.

In 1837 he conveyed the said premises to one Bradley Clay, and continued in possession as Clay's tenant until 1838.

In 1838 Clay and wife conveyed the premises to one Cornelius V. Covert, who entered and occupied the premises for a time, and then conveyed a portion of them to the Defendant Sniffin, and another portion to the Defendant Isaac Covert. On the 5th of November, 1841, Cornell, the obligor of the bond, paid on account of the debt secured thereby the sum of $100, and on the 9th of December in that year paid a further sum of $200. Judgment at Special Term was given for a foreclosure and sale of the mortgaged premises, which was reversed at General Term, and a new trial granted.

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Defendants set up in their answer that said bond and mortgage had been paid, and that there was nothing due thereon. They attempted to show actual payment by Cornell of the whole amount due, but it appeared that, in 1842, he paid to one De Mott a sum sufficient to liquidate the balance due on said bond and mortgage, but that De Mott had never paid the sum over to the Plaintiffs.

The Defendants then relied upon the presumption of payment created by the statute.

The Revised Statutes provide that "after the expiration of twenty years from the time a right of action shall accrue upon any sealed instrument for the payment of money, such right shall be presumed to have been extinguished by payment; but such presumption may be repelled by proof of payment of some part, or by proof of a written acknowledgment of such right of action within that period" (2 R. S. 301, § 48).

The mortgage set out in the proofs in this action is not a sealed instrument for the payment of money (See Code, §§ 162, 246).

It contains no covenant for the payment of money, and does not, therefore, fall within the class of instruments enumerated in the statute. The right of action upon such an instrument, it not being for the payment of money, cannot be affected by this clause of the statute.

It is well settled in this State that a mortgage is a mere security, a pledge of land covered by it for the money borrowed or owing and referred to in it (Kortright *v.* Cady, 21 N. Y. 343).

But the mortgage ceases to have any force or effect upon the extinguishment of the debt for which it is given as security.

If the debt secured was paid, then the lien of the mortgage was at an end. It becomes, therefore, the turning point in this case to ascertain if that debt is paid.

The statute, we have seen, already quoted, declares that after twenty years from the time a right of action shall accrue upon a sealed instrument for the payment of money, such right shall be presumed to have been extinguished by payment.

Now this bond was a sealed instrument for the payment of money. The right of action accrued upon it on the first day of

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April, 1831, when the last instalment became due. This action not having been commenced until August, 1853, the presumption arose that it had been extinguished by payment.

This is now the claim of the Defendants—not actual payment, but the presumption of payment created by this lapse of time, and the provision of the statute. In Morey *v.* Farmers' Loan and Trust Company (14 N. Y. 302) Judge Wright refers to this statute and the change it effected. He says: "Prior to the enactment of this provision, at common law a presumption of payment of a bond, mortgage, or other contract for the payment of money, was allowed to prevail, to the defeat of actions on those instruments, after the lapse of twenty years, or, in some cases, a less time.

"Such presumption, however, might have been rebutted by any evidence, parol or written, tending to show that payment had not been made. The revisers of the statute, whilst they proposed to fix the term that should elapse before the presumption attached, did not propose to disturb the rules of evidence by which the presumption of payment might be repelled, and accordingly, as they reported the section to the Legislature, it read, 'but such presumption may be repelled by competent proof of an acknowledgment of such right of action within that period,' thus leaving it to the Courts to say what circumstances should be sufficient to repel the presumption.

"The Legislature struck out the words 'competent proof,' and in place thereof inserted 'by proof of payment of some part, or by proof of a written acknowledgment of such right of action within that period,' clearly evincing an intention to restrict the repelling evidence to proof of payment of part, or an acknowledgment in writing of the right of action within the twenty years. (Revisers' notes to § 48, supra.) The intention of the statute was to exclude every description of rebutting evidence except that expressly mentioned in it. The maxim, 'expressio unius exclusio est alterius,' is as applicable to the construction of statutes as to contracts."

We have thus laid down a clear and unmistakable rule to

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apply to the construction of this statute. As the mortgage stands as a simple security for the debt mentioned in the bond, it follows that whenever that debt is paid, or no action can be maintained to enforce its payment, the lien created by the mortgage ceases, and it, of course, cannot be enforced. The bond given is an instrument for the payment of money, and, if an action cannot be maintained upon it, such right shall be presumed to have been extinguished by payment.

Thereupon the Defendants have set up in the answer payment of the debt, which the mortgage was given to secure, and have been allowed to prove:

1. Actual payment, and, failing in that, constructive payment by lapse of time, which the statute declares shall be deemed presumptive payment. The Plaintiffs rebut or repel this presumption by showing payments in part of that debt by the obligor of the bond given therefor, and the person primarily bound to pay the same, within twelve years before this action was commenced. It clearly follows, therefore, that at the time these Plaintiffs sought to enforce their lien upon the land pledged for the payment of this debt, that debt remained in full force and vigor, and the presumption of payment arising from lapse of time was repelled and overcome.

These Defendants have no equities superior to the right of these Plaintiffs to resort to the pledge given to secure their debt. It still remains a debt due and owing to them, and their right of action upon the sealed instrument given for its payment remained in its pristine force and vigor at the time of the commencement of this action. These Defendants purchased the premises pledged for the payment of that debt with full knowledge of its existence, and we are authorized to assume that either the amount due at the time of their purchase was deducted from their purchase-money, or, in lieu thereof, they elected to rely upon the personal covenant of their grantors to save them harmless therefrom.

I cannot concur in the view that the lien is extinguished for the payment of this debt, without some act or omission of the

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holder thereof, so long as the debt, for which it stands as security, remains legal, valid, subsisting, and unpaid.

In Hughes v. Edwards (9 Whea. 489), a bill was filed to foreclose a mortgage given in 1793, and recorded in 1794. The bill was filed in June, 1816. Subsequent to the execution of the mortgage, the mortgagor sold part of the mortgaged premises to several parties who were made Defendants, and it was claimed that the Plaintiffs were barred of their right to foreclose by length of time. It appeared that the mortgagor had written two letters to one of the Plaintiffs, in 1803 and in 1808, admitting that the mortgage was then subsisting, that the debt was unpaid, and they contained promises to pay it when it should be in the power of the writer. In addition to this, credits were endorsed on the bond for payments made on the 15th of January, 1798, the 15th of May, 1803, and the 2d of August, 1808. The Court said: "The mortgagor, then, cannot rely upon length of time to warrant a presumption that this debt has been paid or released, the circumstances above detailed having occurred from eight to thirteen years only prior to the institution of this suit."

It is apparent from the case that the acknowledgments and payments were made by the mortgagor, after the conveyance by him of portions of the mortgaged premises to the other Defendants. Judge Washington, in the opinion of the Court, says:

"But it is insisted that, although these acknowledgments may be sufficient to deprive the mortgagor of a right to set up the presumption of payment or release, they cannot affect the other Defendants, who purchased from him parts of the mortgaged premises for a valuable consideration.

"The conclusive answer to this argument is, that they were purchasers with notice of this incumbrance. It must be admitted that it was but constructive notice; but for every purpose essential to the protection of the mortgagee against the effect of those alienations it is equivalent to a direct notice, and such is unquestionably the design of the registration laws of Kentucky.

"A purchaser, with notice, can be in no better situation than the person from whom he derives his title, and is bound by the

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same equity which would affect his rights. The mortgagor, after forfeiture, has no title at law, and none in equity, but to redeem upon the terms of paying the debt and interest. His conveyance to a purchaser with notice passes nothing but an equity of redemption, and the latter can, no more than the mortgagor, assert that equity against the mortgagee, without paying the debt, or showing that it has been paid or released, or that there are circumstances in the case sufficient to warrant the presumption of those facts, or one of them.

"The Court is, therefore, of the opinion that this objection cannot be sustained by either of the Appellants."

The doctrine of this case has received the unqualified approval of Chancellor Walworth in Heyer v. Pruyn (7 Paige, 465). In this case the mortgage was given in July, 1809. In 1812 the mortgaged premises were sold, under judgment against the mortgagor, and purchased by one Van Dyke.

At the time the arrangement was made whereby Van Dyke was to become the purchaser, a statement of all the judgments and other incumbrances on the property was made out, and Heyer's mortgage was included therein, for the whole amount of principal and interest from its date, as a valid and subsisting incumbrance on the premises.

Van Dyke subsequently conveyed the premises to one Shaver, through whom the Defendants took title.

The Chancellor held that the fact of the purchase by Van Dyke, with full notice of the bond and mortgage, and of the amount claimed to be due thereon, was a distinct recognition by him of the existence of that bond and mortgage as a valid lien upon the premises in September, 1812; and that if he had continued the owner of the mortgaged premises until the commencement of that suit in January, 1832, it was evident that he could not have set up lapse of time as a bar to the Complainant's suit, even if there had been no subsequent payment on the bond and mortgage, nor any recognition of the same as a subsisting debt. The Chancellor says: "The Defendants, therefore, claiming through the conveyance from Van Dyke to Shaver, sit in the seat of the

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grantor in that conveyance, and are bound by his previous recognition of the mortgage as a subsisting incumbrance upon the premises, within twenty years.

"In the case of Hughes v. Edwards (supra) the Supreme Court of the United States held that purchasers from the mortgagor, who had either actual notice of the mortgage at the time of their purchases, or had constructive notice by means of the registry, were bound by a previous acknowledgment of the person under whom they claimed of the existence of the indebtedness within twenty years."

These views would seem to be decisive of the Plaintiffs' right to maintain this action, and to have the land sold which had been pledged for the payment of their debt, and which debt, at the time of the commencement of this action, was valid, subsisting, and legal.

GROVER, J.—This action was commenced in 1853, to foreclose a mortgage given in 1829, by William Cornell, upon certain lands in Seneca county, in which the mortgage was recorded shortly after its date. The mortgage was given to secure the payment of fourteen hundred dollars, in two annual payments from date, according to the condition of a bond of the mortgagor therewith given.

The bond and mortgage, by various assignments, were transferred to the Plaintiff, long before the commencement of the action.

In 1837, Cornell conveyed the land to one Clay, in fee, and by various conveyances the title became vested in the Defendants, before the commencement of the action.

Cornell, while he owned the land, made various payments upon the bond and mortgage, but none within twenty years of the commencement of the suit. After the conveyance of the land by Cornell, and while he had no interest therein, and within twenty years of the bringing of the action, he, without the knowledge of the then owners, made payment to the Plaintiff upon the bond and mortgage. The action was referred to a referee to report the

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facts, who heard the proofs of the parties, and made his report to the Supreme Court, at a Special Term, at which judgment was given for the Plaintiffs for the sale of the mortgaged premises, and for payment of the amount found due, together with costs. The Defendants appealed from this judgment to the General Term, by which the judgment was reversed, and a new trial ordered. From this order the Plaintiffs appealed to this Court.

The statute (2 v. 301, § 48) provides that after the expiration of twenty years from the time that a right of action shall accrue upon a sealed instrument for the payment of money, such right shall be presumed to have been extinguished by payment; but such presumption may be repelled by proof of payment of some part, or by proof of a written acknowledgment of such right of action within that period. In the present case, Cornell, by making payments upon the bond and mortgage within twenty years of the commencement of the suit, has repelled the presumption of payment, so far as he is concerned, and as against him the debt was valid and subsisting—against which he had no defence.

The Defendants insist that although the debt was in full force against Cornell, yet the presumption of payment applies to them, inasmuch as they and the other owners of the equity of redemption have made no payment upon the mortgage within twenty years from the time it became due before the commencement of the suit.

The counsel, in support of this position, cites Van Keuren *v.* Parmelee (2 Coms. 523), and other cases, holding that payment by one joint debtor upon a demand does not prevent his co-debtor from availing himself of the Statute of Limitations as a defence. This is based upon the want of authority of one joint debtor to do any act affecting the rights of the other debtor. In the present case it cannot be claimed that the mortgage debtor had any authority from his grantor, or the other owners of the equity of redemption, to act as their agent in any respect, or to do any act affecting their rights. He could not by any act of his create or continue any debt or liability against them without their assent.

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He could not, after the conveyance by him, do any act affecting the title of his grantors. In these positions I fully concur with the reasoning of the learned counsel. But I think the present case does not come within any of the above propositions. Cornell, while owner of the premises, mortgaged the same as security for his debt.

His grantor took the title subject to this pledge. The record of the mortgage was notice to all of the existence of the mortgage.

The land, having been pledged as security for the debt of Cornell, would so continue until that debt was in some manner discharged, unless the land was released from the lien by some act of the holder of the mortgage.

Cornell had the power to prevent the discharge of the debt by the presumption of payment from lapse of time, by making partial payment, or by written acknowledgment. This he has done; consequently the debt is in full force as against him. The pledge was made by him to secure this debt of his own, not to secure any debt of the Defendants, or of any other owner of the equity of redemption. Subject to this lien for Cornell's debt, his grantor and the other owners of the equity of redemption took the title, and also subject to the power of Cornell to repel the presumption of payment in the mode specified in the statute. The defence claimed was that of payment of the debt of Cornell. The evidence relied upon for its support was the presumption from lapse of time. This presumption was repelled by proof of payment by Cornell, the debtor.

The defence of payment of the debt, therefore, failed. This was not continuing or reviving a debt against the Defendants. There was no debt against them at all upon the mortgage or bond. No personal liability against them was claimed. It was not an act affecting their title. That title was always subject to the lien of this debt of Cornell's, and all that Cornell did was to furnish the proof that the debt had not been paid. No presumption of payment by the Defendants could attach by virtue of the statute, for the reason that they owed no debt, nor were subject to any liabil-

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ity that could be satisfied. They owned the land, subject to the pledge for the payment of the debt of another, and when they sought to discharge it therefrom, the onus was upon them to show payment of the debt; and any evidence that was competent and sufficient to prove the debt not paid was an answer to the defence, and proved the continuance of the lien.

In Heyer *v.* Pruyn (7 Paige, 465) it was held that a recognition of a mortgage as an existing lien by one about to acquire title, and who did thereafter acquire it, continued the lien for twenty years after such recognition, as against him and his subsequent grantors. In Hughes *v.* Edwards (9 Wheaton, 490) the Supreme Court of the United States held that a subsequent purchaser, having constructive notice of a mortgage, by reason of its registry, was bound by an acknowledgment of a former owner within twenty years, although he had no notice of such acknowledgment.

These cases, while not involving the precise question in the present case, show that a purchaser, finding a mortgage upon the land, cannot rely upon the presumption arising from the lapse of twenty years, but must ascertain, at his peril, whether anything has been done to repel the presumption arising from that fact. The registry of a deed given by a mortgagor subsequent to the mortgage is no notice of such conveyance to the mortgagee. The latter is under no obligation to search for such conveyance. A rule holding the lien of a mortgage discharged after the lapse of twenty years from its becoming due, notwithstanding the mortgagor had punctually, from year to year, paid the annual interest, because of a conveyance of the mortgaged premises by the mortgagor, unknown to the mortgagee, would be harsh and unjust.

To hold that the lien continues until the debt for which the mortgage was given was discharged by the debtor, is no hardship to the purchaser of the equity of redemption. He knows of the lien when he purchases, and may at any time thereafter make payment; or otherwise, if practicable, procure its discharge. To hold a debt presumptively paid, and therefore adjudge it paid as

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to third persons, while it is found not paid, but in full force against the debtor, would be anomalous.

This statute is not analogous to that of Limitations. This upon which the present defence is predicated merely establishes a rule of evidence as to payment upon sealed instruments. And the answer alleging payment of the debt was the proper mode of prosecuting the defence, whether proof of payment in fact, or the presumption created by statute, was relied upon to sustain such allegation.

The order of the General Term, reversing the judgment of the Special Term, and directing a new trial, should be reversed, and the judgment of the Special Term affirmed.

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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CHARLES C. MERCHANT, APPELLANT, v. FREDERICK D. BUNNELL, AND LOUISA, HIS WIFE, RESPONDENTS.

Husband and Wife—Agency of Husband.

Where property is bought by the husband as the agent of the wife, and afterwards sold by him, as such agent, at a profit, the profits belong to the wife. There is nothing in the policy of the law as it now exists which makes the agency of the husband, acting for the wife, differ from the like agency of any other party.

H. R. Mygatt, for Appellant.
D. Pratt, for Respondents.

DAVIES, CH.J.—The Plaintiff, as a judgment creditor of Frederick D. Bunnell, seeks to charge a tract of land of 356 acres, the title of which stands in the name of his wife, for the payment of said judgment. The land was purchased by the wife, with money furnished her by her father, and the deed taken directly to her; and for the balance of the purchase-money she executed her bond and mortgage. The Court, which tried this action without a jury, found as facts, that Bunnell, the judgment debtor, did not pay any money or property, or agree to pay any, either directly or indirectly, toward the said 356 acres of land in dispute; nor did he or his wife actually intend to hinder, delay, or defraud the Plaintiff or any other creditor of the said Frederick D. Bunnell.

The Court also found that Mrs. Bunnell obtained the legal title to the 356 acres of land by reason of the exercise of the skill, talents, and judgment of her husband, combined with her own, and by the labors of each, and by the use of the money which she obtained and paid on account of said purchase, and upon the security which she gave therefor. And as a conclusion of law the Court held that the 356 acres of land in dispute were profits made in a speculation or business, mainly by the combined services, skill, and judgment of Mr. and Mrs. Bunnell, and that

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said land is liable in equity for the payment of debts which Mr. Bunnell owed at the time the same was purchased by Mrs. Bunnell, and that the Plaintiff was entitled to judgment declaring said 356 acres of land liable for the payment of his demands against Mr. Bunnell, and judgment was rendered for the Plaintiff accordingly, with costs. On appeal to the General Term, this judgment was reversed, and a new trial ordered. The Plaintiff appeals from this order to this Court, and stipulates that, if the same be affirmed, judgment absolute shall be rendered against him.

The only question presented for adjudication in this case is, whether property bought by the husband, as the agent of his wife, with her money, and afterward sold by him as her agent, at a profit, is, to the extent of the profit, subject to the claims of the creditors of the husband, on the ground that the profit was the result of his skill or ability; it having been found by the Court, as already stated, that the property was not bought or sold with intent to defraud the creditors of the husband. It is to be observed, in the first place, that it is difficult, if not impossible, to separate and determine the proportion of profit exclusively derived from the talent, skill, and ability of the husband, from that derivable from the capital, talent, and skill of the wife. It is very clear that the Court, upon the trial of the action, erred in assuming that the whole profit made by the use of money and credit of the wife, and her talent and skill, was exclusively the product of the skill and ability of the husband. No discrimination was made by the Court which tried the action as to what part of the profit was the result or product of the labor of the husband, or what was produced by the use of the money and credit of the wife. The difficulty, if not the impossibility of making this discrimination, may possibly have led the Court into the error of holding that the whole profit made upon the investment of the money of the wife, was exclusively due to the skill and talent of the husband. The real question for adjudication is, whether the profits derived and made upon an investment of the money of the principal, in the name of the principal, by an agent acting as such, belongs to

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and is the property of the principal, or is that of the agent? The simple statement of this proposition carries with it the appropriate answer. And the result is none the less the same because the principal and agent may sustain other relations to each other, as are, in the present case, the intimate one of husband and wife. This Court has frequently held that there is nothing in the marriage relation which forbids the wife to employ her husband as her agent in the management of her estate and property, and that such employment does not subject her property, or the profits arising from such business, to the claims of the creditors of her husband (Sherman v. Elder, 24 N. Y. 381; Knapp v. Smith, 27 N. Y. 277; Bulkley v. Wells, 33 N. Y. 518; Gage v. Dauchy, 34 N. Y. 293).

These cases conclusively establish the right of the wife to her separate estate, and that neither the same, or the profits derived therefrom, although the same be managed by the husband as the agent of the wife, can be subjected by the creditors of the husband to the payment of their debts. The precise point now presented for adjudication arose, and was decided in Bulkley v. Wells (ubi supra). It was there held that a married woman is entitled to the profits of mercantile business conducted by the husband in her name, when the capital is furnished by her, and he has no interest but that of a mere agent. It was pertinently observed by Judge Campbell, in this case: "The creditors of the husband have no right to complain if persons are found who are willing to give credit to the wife. If they cannot enforce their claim at law against her, it is their own misfortune, and does not concern or affect the rights of the husband's creditors; and it is difficult to see how it thereby tends to vest the title of the property purchased for her, and for which credit is given to her, in her husband.

"It is also said that the skill and labor of the husband, when employed by the wife, as in this case, enters into and forms, as it were, a part of the property, and increases its value. If the business is successful, granted; but the title is not thereby divested. At most, he could have but a lien for his wages.

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The whole case turns upon the question, whether a wife, having separate property, can employ her husband as her agent. If she can, then the objections raised cannot avail as a defence. This question was distinctly settled in Knapp v. Smith (27 N.Y. 277), where the law is very distinctly laid down, and where it was held that a married woman, having property of her own, could manage it by the agency of her husband, or any other, and hold the profits and increase to her separate use."

The doctrine of these cases has received the emphatic approval of this Court in the case of Gage v. Dauchy (ubi supra).

The order granting a new trial in this action should be affirmed, and, in pursuance of the Appellant's stipulation, judgment absolute should be rendered against him, with costs.

All concur.

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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CHRISTOPHER VAN DEUZEN, LAYSEL BANCROFT, THE METHODIST EPISCOPAL CHURCH AT FORT EDWARD, AND STEPHEN B. LEE, RESPONDENTS, v. THE TRUSTEES OF THE PRESBYTERIAN CONGREGATION AT FORT EDWARD, APPELLANTS.

Church organized under General Law can maintain Ejectment.

The Methodist Episcopal Church of Fort Edward, organized under the General Law, in 1828, and in accordance with the discipline of said church, became a legal corporation, and as such acquired the legal title to lands conveyed to them for the purpose of erecting a house of worship thereon, and as such corporation can maintain ejectment against those who wrongfully enter upon and detain from it said premises.

James Gibson for Appellants.
A. D. Wait for Respondents.

DAVIES, CH.J.—This was an action of ejectment, and tried by the Court without a jury.

The following facts were found by the Court:

In 1828 there was no house that had been dedicated to religious worship, and no organized Christian denomination of any kind, at the village of Fort Edward, in the County of Washington, and no stated preaching of the gospel nearer than Sandy Hill, about two miles distant. In that year, Rev. Julius Fields, residing at Glen Falls, the minister of the Methodist Episcopal Church in charge of the Glen Falls and Sandy Hill stations—the latter station embracing Fort Edward—did, in conjunction with members of the Methodist Episcopal Church living at Fort Edward and its vicinity, go through with all the necessary steps for organizing and incorporating a religious society in Fort Edward, by the name of "The Methodist Episcopal Church of Fort Edward," which was done in conformity with the discipline of the Methodist Episcopal Church of the United States, and pursuant to the statute of the State of New York, in such case made and provided, and said church became then duly incorporated.

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That the certificate of proceedings was acknowledged before a Justice of the Peace of Washington County, and was forwarded at that time to the Clerk's office of said county, for the purpose of being recorded therein; that said certificate cannot now be found of record therein; that said original certificate is lost, and cannot now be found.

At the meeting which was duly convened for that purpose in Fort Edward, in December, 1828, William Van Notrick, Harry Forbes, Christopher Van Deuzen, Laysel Bancroft, and Thomas Scoville, communicants of the Methodist Episcopal Church, were elected trustees of said church.

On the 28th of April, 1829, Walter Rogers and his wife duly conveyed to the said Van Notrick, Forbes, Bancroft, Scoville, and Van Deuzen, naming them, trustees of "The Methodist Episcopal Church" of Fort Edward, and their successors in office, parties of the second part, in consideration of seventy-five dollars, the receipt whereof is therein acknowledged, and did grant, bargain, sell, alien, remise, release, convey, assure, enfeoff, and confirm to the said parties of the second part, and to their successors in office, in trust, for the uses and purposes thereinafter named and described, forever, the land described in the complaint, for the purpose of erecting a house or place of worship for the use of the Methodist Episcopal Church; "and in the further trust and confidence that the said church shall at all times enjoy the undisturbed right and privilege on these premises of the preaching of God's holy word, and the administration of the ordinances and the discipline of said church, according to its established usages and customs; with the single pledge and understanding of the second part, that when the said house is not occupied by the said Methodist Church, it shall be opened for the service of any other recognized Christian denomination." The deed granted all the title of the party of the first part to the parties of the second part and their successors in office, for the purpose above named, forever, with covenants of quiet enjoyment, and further assurance and general warranty. The deed was duly acknowledged and recorded in the Clerk's Office of Washington County, November 1, 1831.

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Rogers was in possession of the premises at the time of said conveyance, and owned the same in fee. Subsequently, in the years 1829 and 1830, a house of worship was erected on said lot by subscriptions, raised mostly by the adherents and members of the Methodist Church, and partially from adherents of the Presbyterian Church in that vicinity, and some from other persons. The building was constructed by persons styling themselves "the Building Committee of the Methodist Episcopal Church"—and said committee were members and adherents of that church—at a cost of about $2,500. On its completion it was dedicated as a Methodist Episcopal Church. Upon a stone over the door were engraved the words, "First Methodist Episcopal Church of Fort Edward." From the time of its dedication, in 1830, to May 7, 1859, the trustees of the Methodist society had the charge and care of the building, and during this time one of them, or the sexton of said society, uniformly kept the key of said church. During this time the building was occupied by the Methodists on Sundays, in the forenoon, as their house of worship, and sometimes in the afternoon. Frequently, in the afternoon and evenings, it was occupied by the Presbyterians, and ministers of that denomination settled in the adjoining towns usually officiated at such times; and when so used, application was made to the sexton or trustee of the Methodist Church for the key. There was no organized society of Presbyterians at Fort Edward until the 17th of January, 1854. On the 24th of April, 1854, the said society (the Defendants in this action) became duly incorporated as a religious society, under the name of "The Trustees of the Presbyterian Congregation at Fort Edward." In March, 1853, three of the trustees, claiming to be "trustees of the Methodist Episcopal Church of Fort Edward," made application to the County Court of Washington County, under the statute, to sell the said church and lot upon which it was situated; which sale was ordered, and the proceeds directed to be appropriated to the purchase of a new site, or the erection of a new church in said village, as the trustees should deem advisable. Under and in pursuance of such order, the said trustees, on the 26th May, 1853, executed to the Plaintiff Lee a

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deed for said church and church lot, for the consideration of $1,200, paid by said Lee, by conveying a lot for a new site, valued at $600, and $600 in cash, which cash was applied to the materials of the new church. Lee, at the time he took this deed, knew the terms of the Rogers deed aforesaid. After the execution of this deed to Lee, the Methodists continued to occupy this building as a house of worship, paying Lee rent for its use till May 7, 1859, when they commenced occupying their new church edifice, erected in said village, then just completed. This new edifice and its lot were paid for out of the avails of the old one, and by voluntary subscriptions from Methodists and others. From May 7, 1854, until August the same year, Lee kept the custody of the key of the old church, and during that period the property was not used for any purpose. In August, 1854, the Defendants, without the permission of Lee, or of any of the Plaintiffs, broke open the old church on Sunday, and occupied it for religious worship. On Saturday of the following week Lee fastened the church up more securely, and the next day the Defendants again broke it open, and again occupied it for religious worship. They have ever since continued to occupy it for that purpose, and have repaired it and made permanent improvements upon it to the extent of some $1,200, under protest and objection from Lee. Three of the first trustees and grantees in the deed from Rogers and wife were dead in 1854, to wit: Scoville, Forbes, and Van Notrick. The two survivors, Van Deuzen and Bancroft (Plaintiffs in this action), on the 24th of October, 1854, executed to Lee a deed of the old church premises. About the year 1844 a bell was procured, by general subscription among the Methodists, Presbyterians, and others, at an expense of about $400, and placed in this old church. The petition for that purpose was circulated by the minister and officers of the Methodist Church, and the subscriptions therefor were obtained by their procurement and solicitation. Three of the trustees of that church, about the time of the completion of the new church, removed this bell and placed it in the new church, where it still remains.

And as conclusions of law: That the Plaintiff, "The Metho-

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dist Episcopal Church of Fort Edward," is a religious corporation, duly incorporated, and was such on the first of May, 1829, and then had, and ever since has had and still has, lawful title to the real estate described in the complaint in this action, as owner of said real estate in fee, and was entitled to the possession of the said real estate at the time of the commencement of this action, and still is entitled to the possession of the same. That neither of the other Plaintiffs has a right to recover the same in this action. That the conveyance by Bennet, Eddy, and Bancroft to Lee, under the order of the Court, on the 19th of March, 1853, is insufficient to pass the legal title of said real estate to said Lee. That the equitable title to said real estate is in said Lee, by reason of said proceedings for the sale of the same, and the payment of the purchase-money by him, and he is entitled to a conveyance thereof, in due form, by said Methodist corporation. But the legal title now remains in the said Plaintiff, the Methodist Episcopal Church. That the Defendant has no right, title, or interest, legal or equitable, in the said real estate, or the building thereon, under or by virtue of the deed from Walter Rogers and wife to Christopher Van Deuzen and others, aforesaid (dated 28th April, 1829), or otherwise. That the Defendant entered into the possession of said premises wrongfully and unlawfully, and unjustly withholds the possession thereof from the said Plaintiff, "The Methodist Episcopal Church." That the bell referred to in the answer in this action is the property of the said Plaintiff, "The Methodist Episcopal Church;" and the Defendants have no right, title, or interest therein. That said bell was rightfully removed to the new church, and retained and used therein by said Plaintiff. That the Defendant is not entitled to the relief, or any part thereof, demanded in the answer, or any relief against the said Plaintiffs, or either of them, in this action. That the said Plaintiff, "The Methodist Episcopal Church of Fort Edward," is entitled to judgment in this action against the said Defendant; that the said Defendant be adjudged to surrender the possession of the said real estate to the said Plaintiff; and that the said Plaintiff recover of the said Defendant the costs and disbursements of the

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said Plaintiff herein; that the complaint be dismissed as to the three plaintiffs, Van Deuzen, Bancroft, and Lee, with costs and disbursements to the Defendant against them, to be adjusted and inserted in the judgment roll.

Judgment was entered accordingly, and on appeal to the General Term the same was affirmed, and the Defendants now appeal to this Court.

The appeal brings up for review the correctness of the judgment rendered in favor of the Plaintiff, "The Methodist Episcopal Church of Fort Edward," against the Defendants. We are not embarrassed by the question discussed in the opinions of the learned judges of the Fourth District when this case was first before them upon the report of a referee, before whom the same had been tried. That referee reported as a fact, that "The Methodist Episcopal Church of Fort Edward" was never incorporated, and never had a legal existence. The Supreme Court held that the evidence did not authorize the referee to find this fact; and that Court reversed the judgment of the referee, and ordered a new trial. Upon the second trial the facts were found by the Court as already detailed.

We have now the fact found that said church, in or about the year 1828, was duly incorporated, pursuant to the statute of the State of New York in such case made and provided.

The Methodist Episcopal Church at Fort Edward was, therefore, a legal corporation, and being such, the grant of the land in dispute, made on the 28th day of April, 1829, by Walter Rogers and his wife, to the then trustees of the said church, for its use, vested the title of the land in that corporation.

1 Rev. Stat. 727, § 47, declares that every person, who, by virtue of any grant, assignment, or devise, now is or, hereafter shall be entitled to the actual possession of lands, and the receipt of the rents and profits thereof, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest.

In Welch v. Allen (21 Wend. 147), the Supreme Court held that in that case, the trust being merely nominal in 1830, when

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the Revised Statutes went into operation, it became executed in the cestui que trust, by virtue of the forty-seventh section of the article on uses and trusts (already quoted), and, consequently, the Plaintiff held the legal title, and was entitled to maintain that action. The head-note to this case is, "Where a trust of lands is wholly nominal, the trust becomes executed by the statute in the cestui que trust, who may maintain ejectment for the recovery of the lands in his own name, without a previous conveyance from the trustee."

To the same effect is the case of Nicoll *v.* Walworth (4 Denio, 385).

Upon the facts found by the referee the Methodist Church corporation have never parted with the legal title to the lands in dispute, so vested in them, and that corporation is, therefore, the proper party to maintain this action.

These views are decisive of this case, and lead to an affirmance of the judgment of the Supreme Court.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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MARY RING AND CHARLES H. RICHARDSON, RESPONDENTS, v. DANIEL STEELE AND ELIJAH SMITH, APPELLANTS.

Real Estate—Deed not recorded— Consideration not paid—Subsequent Grantee.

A deed of real estate is not rendered invalid from the fact that the considerations are not paid at the time of its execution and delivery. A subsequent grantee of land, purchasing with knowledge of a prior conveyance, is not a *bonâ fide* purchaser, even though the prior deed be not entered of record.

APPEAL from the Supreme Court. The action was for the recovery of an undivided half of four acres of land in the town of Java. The cause was tried at the Wyoming circuit, before Mr. Justice Marvin. Each of the parties claimed under Joseph Steele, the previous owner of the premises.

It appeared on the trial that on the 16th of February, 1852, the latter conveyed an undivided half of four acres to the Plaintiffs, in consideration of $250, the payment of which was acknowledged in the deed, though no payment was made in fact.

On the 18th of March following, Steele and his wife executed a conveyance of the entire premises to the Defendant, Daniel Steele, in consideration of $250, the payment of which was acknowledged in the deed; the amount actually paid at the time being $50. When this deed was executed, that given to the Plaintiff had not been recorded, but the Defendant, Daniel Steele, who was the father of the grantor, purchased with notice of the prior conveyance.

The deed to the Plaintiffs was recorded on the 27th of March, 1852, three days after the registry of the deed to Daniel Steele. The latter, on the 15th of March, 1858, conveyed the premises to the Defendant, Smith, in consideration of $250, the receipt of which was acknowledged on the face of the deed.

The Judge held that the mere recital by Joseph Steele, in the conveyance to his father, of the payment of the consideration, was not proof that the latter was a purchaser for value, as against the

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prior grantee; but the fact was established by other evidence, which was met by proof of actual notice of the previous deed.

The Defendants offered to prove that the Defendant Smith purchased from the Defendant Steele, without notice of the deed to the Plaintiffs, except such notice as the law implied from the registry of that conveyance. The evidence was rejected. Exceptions were taken to these rulings, and also to the refusal of the Court to hold, as matter of law, that the Plaintiffs were not entitled to recover.

The jury found for the Plaintiffs, and the judgment entered upon the verdict was affirmed at General Term in the Eighth Judicial District. The Defendants appealed to this Court.

Wm. H. Greene for Appellants.
L. W. Thayer for Respondents.

PORTER, J.—The effect of the deed to Ring and Richardson was to invest them with title to an undivided half of the premises. By accepting the grant they became liable for the agreed price, and the validity of the transfer was not affected by the non-payment at the time of the purchase-money (Barnum *v.* Childs, 1 Sandf. S. C. R. 58; Meriam *v.* Harsen, 2 Barbour Ch. R. 232). The subsequent conveyance of the premises by the grantor to his father was a fraud upon the rights of previous grantees. Through their neglect to put on record the evidence of their title, and the superior vigilance of the Defendant Steele, the deed of the latter would have acquired priority if he had bought without notice of the antecedent grant (1 R. S. 756, § 1). He paid a valuable consideration, but as he did so with knowledge of the previous conveyance, he was not a purchaser in good faith, and cannot claim the protection of the recording act. The Defendant Smith occupies no better position. He is chargeable with constructive notice of the deed under which the Plaintiffs claim, as it was recorded before he made his purchase (Van Rensselaer *v.* Clark, 17 Wend. 25; Jackson *v.* Post, 15 id. 588).

It is unnecessary to consider the question whether a mere recital, by one who has previously parted with his title, that he

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has received value from a subsequent purchaser, is evidence of that fact as against a previous grantee, for in this case the proof is clear that Steele was a purchaser for value, but with full notice of the Plaintiffs' rights.

The record discloses no error prejudicial to the Defendants, and the judgment should be affirmed, with costs.

All judges concurring.

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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RUFUS K. DELAFIELD AND GEORGE BAXTER v. AARON A. DEGRAW.

Contract—Article condemned—No Notice to Contractor.

Where, by the term of a contract, cement is to be delivered to the Defendant at a place, to be taken on board of Defendant's vessel, and to be transported to a distant port, where it is to be of a quality to pass inspection of the proper officials, and the cement thus received is to be paid for in thirty days after delivery on board of the vessel, and payment to be received by approved paper, the title to the cement passes on delivery to the vessel, and the Plaintiff becomes liable to make good every term and condition of his contract. If the cement, or any part of it, is not of a quality to pass inspection at the designated port, and is condemned by the inspecting officer, it becomes the duty of the Defendant to either return such condemned article to the Plaintiff, or to notify him where the same is stored, subject to his order; and, failing to do so, he cannot recover by way of counter-claim for such damaged or condemned cement.

THIS is an appeal from the judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of the Plaintiffs, upon the report of a referee. The action was brought upon the following contract:

This contract, made this 1st day of August, 1855, between Aaron A. DeGraw and Delafield & Baxter: The said Delafield & Baxter contract to deliver to Aaron A. DeGraw forty-two hundred barrels of hydraulic cement, to be equal in quality to the best Rosendale or Newark manufacture, to be packed in air-tight oak barrels, well lined with paper, each barrel to contain not less than three hundred pounds of cement, and to be subject to the inspection of the United States Government Inspector, and at said Aaron A. DeGraw's option as to the place of delivery, to be delivered at the following places, at the option of said DeGraw, viz.: Rondout, at the tackle of the vessel, ninety cents per barrel; New York city, at the tackle of the vessel, ninety-five cents per barrel; at a credit of thirty days from the time of delivery, to be approved paper. Delafield & Baxter reserve the right, if the United States Government will receive the cement in hard wood

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barrels, to pack the same in such barrels. All the cement to be received by Aaron A. DeGraw within four months. The above cement is for Pensacola Navy Yard.

New York, No. 251 South Street, August 1, 1855.

AARON A. DEGRAW.
DELAFIELD & BAXTER.

Witness:
E. G. TUTTLE.

The following were the facts, as established by the referee, after hearing the evidence of the respective parties:

That Plaintiffs delivered to the Defendant, under the contract set out in the complaint, forty-two hundred barrels of cement, as follows:

1855. Sept. 5, 786 barrels at New York.
Nov. 9, 240 barrels at New York.
Nov. 13, 1466 barrels at Rondout.
Nov. 15, 605 barrels at New York.
Nov. 24, 1103 barrels at New York.

The said cement was equal in quality to the best Rosendale or Newark cement, as required by the contract, and was packed in barrels well lined with paper, but such barrels were not oak barrels, nor air-tight, as required by the contract.

The said cement was delivered at New York and Rondout, on board of vessels furnished by the Defendant, and was by him received and carried to Pensacola.

Of such cement some 300 barrels did not pass the inspection of United States Government Inspectors at Pensacola, but Defendant did not return said cement, or notify Plaintiffs to take it back, nor has he showed what disposition was made of it, or what damages he sustained by reason of its defective packing, or its not passing inspection. That said cement was received by Defendant at New York and Rondout, without being inspected at such places of delivery by any Government Inspector, nor did Defendant require it should be so inspected before such delivery. That on or about the 24th day of November, 1855, Plaintiffs sold and delivered to Defendant, at the city of New York, and the Defendant then

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and there purchased and received, ninety-seven barrels of cement beyond the number named in the said contract, and that said last-mentioned cement was worth ninety-five cents a barrel.

That the said cement delivered under said contract, and the cement sold and delivered over and above said contract, after crediting the payments made by the Defendant, amounted, on the 15th of February, 1856, to $811.43.

The referee did further find and report, as matter of law, that the Plaintiffs were entitled to recover for the cement delivered under said contract, though not packed in full accordance with all the particulars mentioned in the contract, and though a portion of it did not pass inspection at Pensacola; and that Defendant, not having returned or notified Plaintiffs to take back any of the cement so delivered, nor shown what damages he has sustained by reason of the Plaintiffs' non-compliance with any of the provisions of the contract, or by reason of any of the cement not passing inspection, is not entitled to recover any amount in this action by way of counter-claim.

The referee, therefore, found that Plaintiffs were entitled to recover judgment against the Defendant for the sum of $811.43, with interest from February 15, 1856, amounting, at the date of his report, to the sum of $995.23, besides the costs of the action.

B. F. Tracy for Appellant.
Geo. W. Foster for Respondents.

HUNT, J.—I regard this contract as containing separate and independent provisions on the part of the respective parties.

The Plaintiffs contracted to deliver to the Defendant forty-two hundred barrels of cement of a particular character, subject to the inspection, at Pensacola, of the United States Government, and with the choice to the Defendant of two places for the delivery of the same, viz., Rondout or New York. The Defendant was entitled to a credit of thirty days on the price, from the time of the delivery, but he was to make the Plaintiffs secure on such credit by giving them "approved paper" for the amount.

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The duty of payment by the Defendant was absolute, and not dependent on the character of the cement received by him at Rondout, nor upon its inspection at Pensacola, nor indeed upon its arrival at that place. It depended simply upon its actual delivery to him (Grant v. Johnson, 1 Seld. R. 247; 1 Saunders, 320a).

The title to the cement passed to the purchaser upon its delivery to him (Wooster v. Sherwood, 25 N. Y. R. 278; Crofoot v. Bennett, 2 Coms. 258).

Its reception by him did not, however, waive his right to have it inspected by the government officials at Pensacola, nor the right of action for any deficiency or non-conformity to the contract.

The whole number of barrels was delivered to the Defendant at New York and Rondout, on board of vessels furnished by him, by him there received, and by him carried to Pensacola.

On such delivery the Defendant immediately became liable to the Plaintiff to pay the money, or to deliver him approved paper at thirty days for the amount of the cement so delivered and received (auth. sup.). He did make payment in a manner satisfactory to the Plaintiffs for the whole amount, except $811.43.

Although the cement was thus accepted by the Defendant, it was under the provisions of the contract as set forth. That contract provided that the cement should be subject to the inspection of the United States Government Inspector, and at Pensacola, as is fairly to be inferred. The referee finds that three hundred barrels did not pass such inspection.

Here was a failure of duty on the part of the Plaintiffs, by which the Defendant may have suffered damage, and on account of which he claims to defeat the Plaintiffs' right of recovery in the present action. The referee held against this view of the Defendant, on the ground which he finds to exist, that he did not return the cement after its rejection, or notify the Plaintiffs to take it back, and that he had not shown what disposition was made of it, or what damage, if any, he had sustained by its defective packing, or its not passing inspection. It is certain that there was not a complete performance in delivering the three hundred barrels which failed

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to pass inspection; but it is equally certain that this circumstance does not alone furnish a cause of action or of counter-claim to the Defendant. He had received the three hundred barrels at New York or Rondout, and had himself transported them to Pensacola.

They were there condemned, and thenceforth are entirely lost sight of.

Whether they were afterward received by the United States authority, whether they were converted to some other use, whether such use resulted in a loss or in an advance, is entirely undisclosed. This proceeding the law will not justify. When the Government Inspector refused his approval of the three hundred barrels, it was the duty of the Defendant at once to have returned the same to the Plaintiffs, or to have notified them of such refusal; to have informed them where the cement was stored, and that it was subject to their order (Reed *v.* Randall, 29 N. Y. 358). The Defendant did none of these things. He gave the Plaintiffs no opportunity to ascertain whether an inspection ought to have been allowed, or whether it could yet be obtained. He allowed no opportunity to turn the cement into money, either at a full price or at a reduced valuation.

He simply did nothing, and, so far as the Plaintiffs are concerned, permitted the cement to be destroyed or wasted. Under such circumstances he has no claim against the Plaintiffs for the reason that the cement did not pass inspection.

Upon the main point of argument I am, therefore, of opinion that the cause was rightly decided below.

The case contains many exceptions to the admission or exclusion of evidence. The most of them are disposed of by the view of the case already taken. The others are carefully considered, and, I think, fully answered in the opinion of the General Term of the Superior Court.

They afford no just ground for ordering a new trial.

In my opinion the judgment should be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

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SMITH DAVIS AND OLIVER DAVIS v. CORNELIUS R. DUFFIE, AND OTHERS.

Practice—Service of Process on Convict in State Prison.

The service of process upon a convict in State Prison is valid to confer jurisdiction upon the Court over the person and rights of the convict. Then, the service of a process commencing a foreclosure suit against the property of the convict is valid to give the Court jurisdiction to foreclose his equity of redemption in the premises.

BOCKES, J.—This action was brought in the Superior Court of the city of New York, to redeem certain lots and possessions, situated in said city, from the effect and lien of a mortgage covering the same, made by the Plaintiff, Smith Davis, to the Defendant, Cornelius R. Duffie, dated March 8, 1838, which mortgage was given to secure the payment of $100, and interest, within two years from its date.

The Court at Special Term gave judgment for the Plaintiffs—holding that they were entitled to redeem the premises from the lien of the mortgage, and determining the rights of the parties Defendant, who had acquired an interest therein.

On appeal the General Term reversed the judgment, and ordered a new trial; whereupon the Plaintiffs appealed to this Court, stipulating that, in case the order should be affirmed, judgment absolute might be rendered against them.

The record shows that on the 2d day of September, 1839, the mortgagor, Smith Davis, was convicted of forgery in the second degree, and was sentenced to the State prison at Sing Sing, for seven years from that time, and that he was confined there during the period of his sentence.

That while he was there in confinement the mortgagee took proceedings to foreclose the mortgage in the Court of Chancery, before the Vice-Chancellor of the First Circuit, and on the 10th September, 1840, obtained a decree of foreclosure and sale, under which decree a sale was had, and the Defendant, Duffie, the mortgagee, became the purchaser of the mortgaged premises.

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Davis was a party to the foreclosure suit. The subpœna issued therein was served on him while imprisoned in the State prison, under the aforesaid sentence, and also on the keeper of the prison. On these facts the question is presented, whether Davis, the mortgagor, was bound by the foreclosure, and his right of redemption thereby barred. It is insisted, on the part of the Plaintiffs, that the service of process on him in prison, under sentence for felony, was unauthorized, illegal, and void; and this position is based on the statute, which declares that "a sentence of imprisonment in a State prison, for any term less than for life, suspends all the civil rights of the person so sentenced, ... during the term of such imprisonment" (2 R. S. 701, § 19).

It is plain, I think, that the convict can claim no immunity under this provision of the statute. Its purpose was not to give him rights or privileges which he would not have if free, or unaffected by a conviction and sentence for a criminal offence. Its language is, that the sentence "suspends all the civil rights of the person so sentenced"—not the rights of others against him.

I concur unreservedly in the remarks of Judge Bosworth, where he says that "Duffie's mortgage lien was not impaired by Davis's guilt or conviction: his right to foreclose remained unaffected;" and further, that if Duffie could not procure a regular, valid decree while Davis was in prison, that it will follow that his conviction and sentence not only suspended his civil rights, but the rights of others against him.

This result was neither effected or intended by the statute. It was decided in Phelps v. Phelps (7 Paige, 150) that service upon a convict in the State prison, as in this case, was regular and valid to confer jurisdiction; and this has been the settled rule of law and practice both in England and in this country for a long period of time (Maddock's Ch. Prac., vol. 2, p. 200; Hoffman's Ch. Prac., vol. 1, p. 109; Barb. Ch. Prac., vol. 4, pp. 50, 51). Even if Davis could be deemed civilly dead, as would have been his condition had he been sentenced to imprisonment for life (2 R. S. 701, § 20), still he would have been answerable to his creditors, according to the usual practice of the Courts. Chitty says:

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"This situation of civiliter mortuus is never allowed to protect him from the claims of private individuals or the necessities of public justice; so that, although he can bring no action against another, he may be sued, and execution may be taken out against him." See also remarks of Chancellor Kent in Platner v. Sherwood (6 John. Ch. 130, 131). Indeed, the decisions are uniform, that although the right of a convict to prosecute an action is suspended, and his property in some instances forfeited, still he may be sued, and the suit against him may be prosecuted to judgment.

Nor is this right taken from a creditor by the provision of the statute declaring that persons imprisoned in the State prison, other than persons adjudged to imprisonment for life, shall be deemed absconding debtors, within the premises of the act providing for relief against absconding and absent debtors. This act was intended to enlarge the rights of creditors, not to limit or restrict them, in regard to persons under confinement as criminals. This subject is fully considered by Mr. Justice Bosworth in his opinion on the appeal in the Court below, and with his reasoning and conclusion on this, as well as on all the other questions in the case, we entirely concur.

The order appealed from must be affirmed, with costs, and judgment absolute against the Plaintiffs rendered, pursuant to the stipulation served with a notice of appeal.

Affirmed.

All concurred in the result.

JOEL TIFFANY,
State Reporter.

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JOSEPH B. VANDERVOORT v. EDWARD S. GOULD.

Real Estate—Possession of Husband under Wife, not adverse—Damages—Interest.

Where the husband is in possession under the title of his wife, his possession can in no sense be considered as adverse to her, as to those claiming under her.

Under the Code, the Plaintiff seeking to recover possession of land may unite in the same complaint a claim to recover the land with a claim for damages for withholding the same.

Interest is properly allowable upon damages for the unlawful detention of real estate.

BOCKES, J.—This action was brought to recover the possession of real property, with damages for its unlawful detention. The Plaintiff succeeded on the trial, and the judgment in his favor was affirmed by the General Term of Supreme Court in the First District. Thereupon the Defendant appealed to this Court.

The premises in question were a house and lot known as No. 18 Clinton Place, in the city of New York. The Plaintiff made title through several mesne conveyances from the Trustees of the Sailors' Snug Harbor in said city. The line of conveyance was as follows:

In 1833 the Trustees of the Sailors' Snug Harbor demised the lot in controversy to C. V. S. Kane, for the term of twenty-one years from November 1, 1831, on certain rents, covenants, and conditions in the instrument of demise stated; which also contained a provision for its renewal on the expiration of the term. On the 15th March, 1836, Kane, the lessee, conveyed the premises, subject to the terms and conditions of the lease, to the Defendant, Edward S. Gould; and the latter, on the 15th of May, 1857, conveyed to George Gould. On the 10th April, 1840, George Gould mortgaged the lease and premises to Cornelius Du Bois, to secure the payment of Edward S. Gould's bond for $4,000 and interest; and on the 9th of July, 1842, George Gould conveyed all his right, title, and interest—being, according to the papers, the

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equity of redemption—to said Du Bois; and on the same day Edward S. Gould also released and quit-claimed the lease to said Du Bois.

Thus Mr. Du Bois became vested with the title as lessee under the original lease.

On the 25th July, 1842, Mr. Du Bois granted and conveyed the lease and premises to his daughter, Mary Elizabeth Gould, the wife of the Defendant, Edward S. Gould, with habendum clause, as follows:

"To have and to hold the same, and the rents, issues, and profits of said premises, unto the said Mary Elizabeth Gould, for the term of her natural life, to her sole and only proper use and benefit and behoof, free from all interference of her said or any future husband, and without the power of disposition or anticipation, and after her death to her children and their representatives and assigns."

The original term of twenty-one years expired Nov. 1, 1852; and on that day the Trustees of the Sailors' Snug Harbor granted a renewed lease to said Mary E. Gould, for the further term of twenty-one years, in the usual form, reserving rent.

By an instrument bearing date Nov. 1, 1855, Mary E. Gould demised the premises to the Plaintiff for the term of five years from that date, at an annual rent of $1,500, payable semi-annually. In January, 1856, the Plaintiff demanded possession of the premises from the Defendant, who then had the occupation, and, possession being refused him, this action was brought.

Various questions of law on the facts were raised during the trial, and also questions as to the admissibility of evidence, all which are hereafter to be considered.

Irrespective of any question arising from the fact that Mary E. Gould was the wife of the Defendant, Edward S. Gould, the right of the Plaintiff to the benefit of his term in the premises is beyond possible controversy. The title comes down from the Trustees of the Sailors' Snug Harbor in a clear and unbroken line, through the Defendant himself, to Mary E. Gould, who, by a valid instrument, demised the premises to the Plaintiff for the term of five

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years. The Defendant offered no evidence of any other title whatever under which his possession could be justified.

The Plaintiff's right to the occupation of the premises, pursuant to such demise, on the conveyances put in evidence, stood, therefore, fully vindicated. Nor is it obvious how the fact that Mrs. Gould was the wife of the Defendant afforded to the latter a defence against the Plaintiff's claim.

Mrs. Gould, at the time of the demise to the Plaintiff, held the legal title under the renewed lease to her, bearing date Nov. 1, 1852.

Although a feme covert, she was entitled to take and hold the property under the Act of 1848, and its amendments, the same as if she had been a feme sole.

It was "her sole and separate property, as if she were a single female," which she held "to her sole and separate use," and which she could enjoy and dispose of, "with the rents, issues, and profits thereof, in the same manner and with the like effect as if she were unmarried" (4 R. S., Edmonds' Edition, 513–514). The husband acquired no right or property therein in virtue of his marital rights (Gage v. Dauchy, 34 N. Y. 293; White v. Wager, 25 N. Y. 328, 330, 331). And even if we construe the rights of Mrs. Gould as having been acquired under the conveyance from her father in 1842, seven years prior to the Act of 1848–9, her husband, the Defendant, will gain no position available as a defence.

The grant was to her, for her separate use, and her husband was expressly excluded from taking any interest in the property conveyed. Equity would have protected her in its enjoyment as effectually as if the grant had been made to a trustee for her benefit.

In Darby v. Callahan (16 N. Y. 71–75), it is said that "prior to the passage of the act, a married woman could take as a gift, or by virtue of a bequest, or under a marriage settlement, and hold separate property, without the intervention of a trustee, and a Court of Equity would protect her in its enjoyment."

In equity a feme covert having a separate estate was always

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to be regarded as a feme sole as to her right of enjoyment of it, and her disposition of it would be sanctioned by a Court of Equity, in the absence of all restraint on such right expressed in the instrument enacting the trust (Jacques v. Meth. E. Church, 17 John. 549).

In Dyett v. North A. Coal Co. (20 Wend. 570–573), Judge Cowen remarks, that when the estate of a married woman is completely distinct, and is held by her independent of her husband, she is to be regarded in equity, in respect to it, as a feme sole, except in so far as she may be expressly limited in her powers by the instrument under which she takes her interest.

This has long been the settled law of the land (Story's Eq. Jur., §§ 1380–1–2).

Now, in this case it is clear that Mrs. Gould, by the conveyance from her father, took a separate estate.

The instrument so declares.

It is therein expressly stated that the property and estate conveyed to her should be for her sole use, benefit, and behoof, free from all interference of her husband. He was, therefore, excluded from all participation in or control over it, and could claim nothing by virtue of the marital relation. And there being no trustee, the renewal of the lease to Mrs. Gould was a very proper act, as at most it but converted an equitable interest into a legal title, without impairing any right of her husband. It follows, therefore, that in any view which may be taken of the case, the Plaintiff's right to the possession of the premises was not affected by the fact that Mrs. Gould was the wife of the Defendant at the time of, and subsequent to, the period when her interest in the premises accrued.

This conclusion is also sustained by the reasoning of the Court and decisions in Westervelt v. Gregg (12 N. Y. 202–211), and in Sherman v. Elder (24 N. Y. 381–385). The third section of the Act of 1860 (Sess. Laws 1860, page 157, ch. 90), which required the assent of the husband to a conveyance by the wife of her separate property, has no application to the case in hand. The lease to the Plaintiff was not a sale and convey-

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ance of the wife's real estate within the provision of that section.

The lease, too, was made years prior to the passage of this act, and the act was amended in 1862 (Sess. Laws 1862, page 343, ch. 172), and the provisions in regard to obtaining the husband's assent, in cases of sale and conveyance by the wife, were omitted and expurgated.

Nor did the clause in the conveyance to Mrs. Gould against anticipation restrain her from leasing the premises for a brief time on reasonable rent.

This was a very proper mode of enjoyment, in no way injuriously affecting her estate, or contravening the purposes of the grantor, as expressed in the clause referred to. It was plainly intended that she should have and enjoy the rents, issues, and profits of the premises, and the restraint was to the effect that she should not dispose of or anticipate the estate or its avails.

The lease to the Plaintiff for a short time, on a fair rent, payable in half-yearly payments, in no sense conflicted with this provision. But it was a provision with which the Defendant had no concern.

Considered as a trust, he was in no position to demand its performance.

He neither created it, nor was he interested in its observance.

It is next urged that the lease to the Plaintiff was void by reason of the Defendant's adverse possession.

There was, however, no proof of an adverse holding which could render the lease void. The Defendant made no claims under adverse or hostile title. On the contrary, he claimed to hold under Mrs. Gould's title, and insisted that his occupation was lawful, because, as husband, he was entitled to the possession of her estate. He was not, therefore, in possession under adverse or hostile title.

But it is urged that if his possession was not adverse, he must be considered as a tenant at sufferance, and was, therefore, entitled to notice to quit.

This suggestion is herein fully answered by the fact that the

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objection was not taken on the trial—hence cannot be insisted on here.

In the course of the trial an instrument, in effect an agreement of separation between Mr. and Mrs. Gould, was offered in evidence, and received against the Defendant's objection. How this paper was material or relevant does not clearly appear.

Indeed, I think it was quite irrelevant and immaterial. But its admission in no way injuriously affected the Defendant's rights.

It was simply innoxious. It had no possible bearing on the question of damages for withholding the premises, which was the only question submitted to the jury.

Nor did it in any way affect the question of title decided by the Court.

The admission of the paper, therefore, being harmless in every possible view, constitutes no ground for reversing the judgment (20 N. Y. 246; 29 N. Y. 502, 503; 25 N. Y. 510; 1 N. Y. 519; 35 N. Y. 59, 60).

See the last case cited (The People v. Gonzaliz). It was remarked by Porter, J., "that the reception of illegal evidence is presumptively injurious to the party objecting to its admission; but where the presumption is repelled, and it clearly appears on examination of the whole record, beyond the possibility of rational doubt, that the result would have been the same if the objectionable proof had been rejected, the error furnishes no ground for reversal;" and it is further there said, that in this respect there is no distinction between civil and criminal cases.

These remarks are sound in principle, and are abundantly sustained by the authorities cited in their support.

The Defendant proved by the witness Roe, that Mrs. Gould left her home and went to France, with her two children, in July, 1855, and that she has since remained absent from this country.

On Plaintiff's motion this evidence was stricken out—and properly so—as irrelevant and immaterial.

Whether Mrs. Gould went abroad or remained in this country, and whether with or without her husband's consent or approval,

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it in no way affected her title to the premises in controversy, or his (Plaintiff's) right to recover in the action. The evidence was immaterial, and was properly expunged.

At the close of the trial, the Defendant's counsel claimed and insisted that he was entitled to have the question submitted to the jury, whether the Plaintiff was the real party in interest in the action, and requested the Court to charge the jury that if the lease to the Plaintiff was only colorable, and intended merely to clothe him with an apparent right to the property, so that he could sue the Defendant and recover the possession or rent for her benefit, then the Plaintiff was not the real party in interest. The Court declined so to charge; but ruled and decided that no case was made on the evidence on which to found such claim and charge; and the evidence put in by the Defendant with a view to establish such claim was stricken out. In this the Court ruled correctly.

The position assumed and urged by the Defendant's counsel had no foundation in fact or law. The proof was clear and uncontroverted, to the effect that the lease from Mrs. Gould to the Plaintiff was valid, and binding on the parties to it.

It gave to the Plaintiff the right to occupy during the term, and bound him to pay Mrs. Gould the specified rent. Both were bound by a legal instrument, and their motives in entering into it were of no importance to the Defendant. With their purposes and intentions he had no concern. There was plainly no error in the ruling of the Court in this regard.

The Defendant's counsel requested the Court to hold and to charge the jury,—

First, that the Plaintiff was entitled to recover only nominal damages in the action. Secondly, that if the Plaintiff was entitled to recover more than nominal damages, he then could recover only such damages as he might have sustained prior to the commencement of the action; and, thirdly, that he was not entitled to recover interest on the annual value or the annual rent of the premises, or interest in any form or to any amount. The Court declined so to hold and charge.

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On recurring to the complaint, it will be seen that the action was brought for the double purpose of recovering the premises, with damages for their unlawful detention.

At common law the remedy for such damages was by separate action of trespass for mesne profits. But under the Revised Statutes the mesne profits were recoverable upon a suggestion on the foot of the record of the judgment in ejectment (2 R. S. 310, §§ 43–44); and this judgment laid the foundation for subsequent proceedings to recover the mesne profits or damages.

Now, however, under the Code of Procedure, the Plaintiff may unite in the same complaint a claim to recover real property, with damages for the withholding thereof (Code, § 167; Livingston v. Tanner, 12 Barb. 481; Holmes v. Davis, 21 Barb. 265; same Case in Court of Appeals, 19 N. Y. 488; Tompkins v. White, 8 Barb. 520; The People v. The Mayor, 17 How. 57–64).

According to these authorities it is optional with the Plaintiff to unite the claims in one action, or have a separate action after the recovery in ejectment for the damages.

It is certainly clear that he may unite the two claims.

The Code is explicit to that effect (§ 167), and the change effected by this provision was commendable with a view to avoid a multiplicity of suits. The Court therefore ruled correctly in holding that the Plaintiff was not limited in his recovery to nominal damages only.

He was also entitled to recover for the unlawful withholding of the premises to the time of the trial.

The Defendant's possession was wrongful, and the claim for damages for this recovery was in the nature of a claim for a tort. The question was, how much was the Plaintiff damaged on the day of the trial by the Defendant's wrongful act, which was continuous to that period. And the same considerations of convenience and propriety should here control, as in other cases where a recovery in one action is permitted, in order to prevent unnecessary litigation by multiplicity of suits.

The judgment should, as it may well do in a case like this, settle and determine the rights of the parties as to the entire sub-

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ject of the litigation, so that, if acquiesced in, no further controversy will remain.

The allowance of interest on the fair annual value of the use and occupation of the premises, during the period they were wrongfully withheld, was a proper subject for the consideration of the jury in determining the amount of damages which the Plaintiff was entitled to recover. Such damages are generally designated mesne profits: that is to say, what the premises were reasonably worth annually, with the interest, to the time of the trial. Less than this would not give the Plaintiff full and complete indemnity for the injury to his rights.

The measure of damages is that which would obtain in assumpsit for use and occupation (Holmes *v.* Davis, 19 N. Y. 488). If the jury in this case were of the opinion that an allowance for interest was necessary to a complete indemnity, they were at liberty to include it in their estimate of damages (Dana *v.* Fiedler, 12 N. Y. 51; Walrath *v.* Redfield, 18 N. Y. 457–461; Richmond *v.* Bronson, 5 Denio, 55). There was no error of which the Defendant can complain in the ruling of the Court as to the allowance of interest. It was quite as favorable as the Defendent could ask, and I will add, that in my judgment the Court might with propriety have instructed the jury that justice to the Plaintiff demanded an allowance for interest on the fair annual value of the use of the premises, from the possession of which he had been wrongfully excluded.

After a careful examination of the case, I can see no ground for reversing the judgment of the Supreme Court.

Affirmed.

JOEL TIFFANY,
State Reporter.

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ELI BENEDICT, RESPONDENT, v. WM. H. DE GROOT ET AL., APPELLANTS.

Negotiable Paper—Rights of Assignee of bonâ fide holder.

An assignee of a promissory note, acquiring title after the maturity of note from a *bonâ fide holder* for value, takes all the rights of such bonâ fide holder.

GROVER, J.—The refusal of the judge to submit the case to the jury was not error. The note was entirely impeached; although it was proved that Wm. De Groot made the note in the name of his firm, for a purpose not authorized by the partnership, yet it appeared to have been discounted by the Exchange Bank without any notice of such fact before maturity. The Plaintiff, at maturity, purchased the note of the bank. He was not a party to the note, and had no interest in it prior to such purchase. Under these facts he acquired, by his purchase, all the rights of the bank. The bank was a bonâ fide holder, and the Plaintiff, by his purchase from it, acquired its rights as such, and was, therefore, entitled to a verdict for the amount of the note. Such a verdict was rendered by direction of the Court. This was correct. This disposes of all the questions raised upon the trial as to the competency of evidence. None of these questions had any relation to the right of the Plaintiff to recover.

The judgment appealed from should be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

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HARVEY C. DUNHAM, &c., RESPONDENTS, v. TROY UNION RAILROAD COMPANY, APPELLANT.

Evidence, conflicting—Nonsuit refused—Delivery without Authority of Owner.

Where the case presented only questions of fact, in respect to which there was conflicting evidence, the Court properly refused to nonsuit the Plaintiff. The case was properly submitted to the jury.

Where a person, in possession of goods which belong to another, and which, in law, he is bound to deliver on demand, delivers them to a third party, without authority from the owner, he is responsible for a refusal of such holder to deliver them to the owner thereof.

E. L. Fursman for Appellant.
M. I. Townsend for Respondents.

DAVIES, CH.J.—The complaint in this action alleges that the Defendant became possessed of, and wrongfully detained from the Plaintiffs, 2,146 railroad ties, the property of the Plaintiffs, of the value of $836.94. Wherefore the Plaintiffs demanded that the Defendant be adjudged to deliver the said property to the Plaintiffs, and pay the Plaintiffs damages for the detention thereof, and that said property may be forthwith delivered to the Plaintiffs. The answer contained a general denial, and the cause came on for trial at the Rensselaer Circuit, before Mr. Justice Peckham, of the Supreme Court, and a jury.

Upon the trial it appeared that the Plaintiffs had sold and agreed to deliver to the firm of Decker & Worthly 17,000 railroad ties, and which were to be delivered on or before the 1st day of August, 1853. This agreement bore date the 8th day of March, 1853. It was provided therein that the ties were to be delivered on the line of the Troy Union Railroad, in quantities, as the said Decker & Worthly might require. The ties, when delivered, were to be approved of by the chief-engineer of the Defendant's road, and the monthly estimates of the engineer of the ties delivered, under the agreement, were to be paid for on or before the 12th day of the succeeding month, less ten per cent.

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of such estimates, which was to be retained until the whole number of ties was delivered and approved as therein specified, and then said ten per cent. was to be paid within thirty days thereafter to the Plaintiffs.

It also appeared that on the 9th of February, 1853, the said Decker & Worthly had entered into a contract with the Defendant to construct and finish in every respect, in the most substantial and workmanlike manner, and to the satisfaction and acceptance of the chief-engineer of said company, the grading, masonry, superstructure, bridging, and fencing of said railroad, furnishing all the materials required; and the same was to be paid for upon monthly estimates of said chief-engineer.

It further appeared that the Plaintiffs had, on a lot adjoining the Defendant's road, 2,146 ties over and above the number required to fill and complete said contract. It appeared that the same were taken by the superintendent of the Defendant on or about the 8th of August, 1854.

The Plaintiffs proved a demand of the ties, at the office of the Defendant, of Mr. Vail, one of the directors of the Defendant's company, and a refusal, and the value of the ties on the day the same were taken, and the interest thereon, and rested.

The Defendant then moved for a nonsuit, on the following grounds:

1. That Plaintiffs had shown no title to the 2,146 ties in question.

2. That there is no evidence that the ties taken were not a part of the 17,000 sold to Decker & Co. by Plaintiffs' firm, under their contract.

3. That the evidence is wholly insufficient to entitle the Plaintiffs to recover.

The Court denied the motion, to which ruling and decision the Defendant then and there duly excepted.

Further testimony was then taken, and the motion for a nonsuit was subsequently renewed upon these grounds:

1. That the Plaintiff has shown no title in himself, at the time of the commencement of the action, to the 2,146 ties claimed.

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2. That the Defendant has shown title in Decker & Co.

3. That the Defendant has shown title in itself.

4. That it appears that the 2,146 ties claimed were part of the 17,000 delivered by the Plaintiffs under their contract with Decker.

5. That these ties were paid for by Defendant to Flood, one of the owners, and were taken under a license from him.

6. That the Plaintiffs had shown no sufficient demand of the ties in question, and cannot recover without such demand.

The Court overruled the motion, and refused the nonsuit, to which ruling and decision the Defendant then and there duly excepted.

Further testimony was then adduced on both sides, and the jury found a verdict for the Plaintiffs for $1,210.35, and judgment thereon was affirmed at the General Term.

No question is presented for consideration of this Court, except upon the refusal to nonsuit the Plaintiffs. No other exception was taken upon the trial.

The first five grounds of that motion presented only questions of fact, and upon which there was conflicting evidence, and the Court properly refused to withdraw their consideration from the jury. Their verdict has established all these questions in favor of the Plaintiffs, and the simple question is presented, whether a sufficient demand was made for the ties in question before suit brought. Mr. Vail, the director of whom the demand was made at the office of the company, was acting as the recognized agent of the company in this matter. The superintendent of the Defendant, who took the ties, testified it was done by the direction of Mr. Vail, a director of the company. The demand upon him was, therefore, sufficient to authorize the Plaintiffs to maintain this action. The Defendant insists that detinue will not lie, as there is no proof that the ties were in the actual possession of the Defendant at the time of the demand, or at the commencement of the action, and it is claimed that the proof shows that the Defendant had parted with the possession of at least a portion of the property to the New York Central Railroad Company. This

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Court have held the contrary of this. In Nichols v. Michael (23 N. Y. 264) we said, that "where a person is in possession of goods belonging to another, which he is bound to deliver upon demand, if he, without authority from the owner, parts with that possession to one who refuses to deliver them, he is responsible in detinue equally with the party refusing. He contributes to the detention. It is the consequence of his own wrongful delivery." The motion for a nonsuit was, therefore, properly refused.

The judgment should be affirmed, with costs.

PARKER, J.—This action is brought to recover possession of 2,146 railroad ties, which, it is alleged, the Defendant wrongfully detains from the Plaintiffs.

The question in the case arises upon an exception to the decision of the Court, upon the trial, denying a motion for a nonsuit; so that the inquiry here is, whether there is any evidence in the case upon which the jury was authorized to find a verdict for the Plaintiffs.

The Plaintiffs were under a contract with Decker & Worthly (who were contractors to build Defendant's railroad, and supply the materials therefor) to sell and deliver them 17,000 ties, such as should bear inspection of the chief-engineer of the road. They did haul and deposit on a lot, called the Warren lot, near a brewery, and adjacent to the railroad, more than the requisite number; and on the 17th of October, 1853, they had on said lot (after having delivered 10,650) 9,882 ties, out of which, according to a computation and agreement on that day made between the Plaintiffs, Decker & Worthly, and the secretary of the company, it required 7,369 to make up the full number of 17,000. Of this required number, 3,800 were for the estimate for September, 1853, and the balance for rejected ties, and deficiencies in the estimates of previous months. There were, therefore, upon the lot 2,513 over and above enough to fulfil the contract between the Plaintiffs and Decker & Worthly, provided they would pass inspection. On the day above mentioned, the secretary of the company, with the consent of Decker & Worthly,

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paid the Plaintiffs the amount to which the 3,800 would come, less ten per cent., for which he agreed to be accountable, and the Plaintiffs authorized the company to take the 7,369, which, it appears, included all that would be required to complete the road.

Between that day and the 22d of February, 1854, when the road was opened, the company proceeded to take ties, from time to time, from the Warren lot. On the 8th of August, 1854, they took 2,146 ties from that lot, some 1,700 of which were sold to the Central Railroad Company, and the residue piled near the depot and used for repairs. These, the Plaintiffs allege, were over and above the 7,369 which Defendant was authorized to take, and whether or not they were so is the question of fact in the case.

There is no direct or positive evidence that the Defendant took more than the 7,369 to which it was entitled; but it appears that, after the taking of the 2,146 in question, only a few hundred were left scattered about on the lot; so that the surplus 2,513 were mostly taken by some person or persons. It appears that no person had authority from Plaintiffs to take any from the lot, except the Defendant, nor was it shown that any other person did take any; but it appeared that Defendant was engaged from October 17, 1853, to February 22, 1854, in taking ties from the lot, for the road, from time to time, though how many it so took does not appear.

It appeared from the estimate, introduced in evidence by the Defendant, that the whole number required for the road was 16,882.

It is argued by the Plaintiffs' counsel that the jury had the right to conclude that the Defendant had used up the 7,369, which would make up the 17,000, by the 22d of February, 1854; and, therefore, that the 2,146 taken in August must have been a portion of the 2,513 surplus, which it had no right to take, especially as but about the difference between these two numbers was left on the lot, after the 2,146 were taken; and that this conclusion is strengthened by the fact that the 2,146 were not needed nor used for the construction of the road, and could not

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be included in the 7,369 which, according to the estimate, were all, or nearly all needed.

It is impossible to say, in the absence of all evidence as to the number taken by the company between October, 1853, and February, 1854, there was no foundation for such conclusion. It was, therefore, a case for the jury, and the nonsuit was properly denied.

But the Defendant insists that the evidence shows that the ties in question were piled, when taken by Defendant, as complained of, within the bounds of the road, and therefore were in Defendant's actual possession, from which the presumption arises that the title was in the Defendant, and that the Plaintiffs did not overcome this inference by evidence.

It is by no means clear that the ties were piled within the bounds of the railroad, but if they were, at the time when taken up and carried to or near the depot, it is shown that they had, by some person unknown to the Plaintiffs, and without their authority, been removed from a place farther back on the lot to a place near the track; which fact, at least, tends to rebut the presumption of title arising from their being in Defendant's possession, by being piled within the bounds of the road. Moreover, the whole case proceeds upon the assumption, on both sides, that the ties in question are a portion of those furnished by Plaintiffs to Decker & Worthly, and that, unless they are a part of the 7,369 which Plaintiffs gave the Defendant liberty to take, they are Plaintiffs'.

It is said again by the Appellant's counsel, that there is no evidence that the ties were in the possession of Defendant at the commencement of this action.

It is shown that the Defendant took them on the 8th of August, 1854, and it appears from the record that the suit was commenced on the 9th of August, 1854. Now, though it appears that the larger portion of them was sold to the Central Railroad Company, it is not shown when, and it will not be presumed that they were not in possession. Without considering what would have been the effect of such want of possession, if it had been shown, it is a

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sufficient answer to the objection now made that it was not shown upon the trial. Also, that no such objection was taken at the trial.

The record does not present any such error as calls for a reversal of the judgment. It must therefore be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

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JOHN PERCEY, APPELLANT, v. JOHN TEN EYCK, RESPONDENT.

Attorney—Power of Supreme Court to strike from Rolls.

The Supreme Court of this State has power, under the statute, to strike from the rolls the name of an attorney for general misconduct in the practice of his profession, after having caused a copy of the charges preferred against him to be served upon him, and opportunity to be heard in his defence.

The proper mode of proceeding in such case, is by the service of an order upon the attorney, to show cause why he should not be stricken from the rolls, etc.

On the hearing, the Court is not confined strictly to the common law rules of evidence.

John Percey in person.
Samuel G. Courtney for Respondent.

GROVER, J.—Appeal from order of General Term of Supreme Court, striking the Appellant from the roll of attorneys and counsellors of the Court.

No question is made as to the correctness of the practice adopted in bringing the matter before the Court. That was an order to show cause, founded upon the papers presented, served with the papers personally upon the Appellant. This was the course approved in Anon. (22 Wend. 656), and pursued In re Peterson (3 Paige, 510). The order specified the charges against the Appellant. Those were, that his general reputation is bad; that he had been several times indicted for perjury, one or more of which was still pending; that he was a common mover and maintainer of suits on slight and frivolous pretexts, and that his personal and professional reputation had been otherwise impeached in a specified trial recently had at this Circuit. The Appellant's counsel insists that the verified minutes of the testimony given upon said trial, taken by a reporter, were not proper or competent proofs in this proceeding. It is said that such testimony is but hearsay, &c. The minutes were competent. The

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common law rules of evidence do not apply to proceedings of this character. It is not claimed but that affidavits were proper evidence. The testimony of witnesses given upon the trial of issues is entitled to the same credit, at least, as the ex parte affidavit of the same witnesses upon the same matters. It may be said that, upon the latter, an indictment for perjury would lie (if false), while in the former it would not, because the testimony was not taken in the proceeding. To this the answer is, that the testimony, if material to the issue upon which it was given, will, if false, equally sustain an indictment for the same offence. No question was made in the Court below but that the testimony was material. Again, these minutes were used only to satisfy the Court that it was proper to prefer charges against the Appellant, and the investigation of the truth of the charges is to be made after service upon the party proceeded against. The Court may and ought to cause the charges to be preferred whenever satisfied, from what has occurred in its presence, or from any satisfactory proof, that a case exists where the public good and ends of justice call for it. Upon the return of the order the Court proceeded properly to investigate the charges. Upon such investigation the evidence was very voluminous, and at the close the Court convicted the Appellant upon the charges by making an order striking him from the rolls. It is not deemed necessary to discuss the evidence; the whole has been carefully examined, and such examination satisfies me that the Court was not only justified but imperatively required to make the order it did against the Appellant, if it possessed the legal power.

By whatever cause the conduct of the Appellant was induced, it is clear that it was such as wholly to unfit him to practise the profession usefully to the public or beneficially to himself. His credibility was destroyed. His character had become bad. He was crowding the calendar with vast numbers of libel suits in his own favor, and in the habit of predicating additional libel suits upon the answers to those previously brought by him. In one instance, at least, he had sued his client in a justice's court, and when beaten upon trial, instead of appealing from the judgment,

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he commenced numerous other suits against him in different towns for the same cause, when he must have known that the demand was barred by the first judgment rendered. The only inquiry is whether, in such a case, the Court has the power to protect the public by preventing such persons from practising as attorneys and counsellors in the Courts of the State, and by that means harass its citizens. At common law the Courts had nothing to do with the admission of attorneys or counsellors to practise (In re Cooper, 22 N. Y. 67). It follows that this power, if possessed, is conferred either by the constitution or statute. Section 8, art. 6, of the Constitution provides, that any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practise in all the Courts of this State. Sec. 58, p. 320, 1 R. S. (4th ed.) provides the manner of admission of such persons to practise. Under this section the Court derives its power for that purpose. Sec. 9 of the Judiciary Act confers upon the Supreme Court the same power to remove attorneys, &c., as was theretofore possessed by the Chancellor and the former Supreme Court. Section 59 (p. 320, 1 R. S.) provides that counsellors, solicitors, and attorneys may be removed or suspended by the several Courts in which they shall be appointed, but, subject to such removal, they hold their offices for life. Sec. 60 provides that any counsellor, &c., may be removed or suspended who shall be guilty of any deceit, malpractice, or misdemeanor, but not until a copy of the charges against him shall have been delivered to him by the clerk of the Court in which the proceedings shall be had, and an opportunity shall have been given to him of being heard in his defence. Sec. 60 provides that a removal by the Supreme Court shall operate as a removal in every Court of the State.

From the above statute the power of removal by the Court is derived. It will be seen that the exercise of this power is dependent upon the general conduct of the person, and is not confined to the class of cases where particular individuals have suffered injury from such misconduct.

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It is insisted by the Appellant that the misconduct justifying a removal is some direct malpractice or misdemeanor, practised or committed in the exercise of the profession only, and that general bad character or misconduct will not sustain this proceeding. I cannot concur in this position. It has been seen that the right of admission to practise is made both by the constitution and statute to depend upon the possession of a good moral character, joined with the requisite learning and ability. It is equally important that this character should be preserved after admission, while in the practice of the profession, as that it should exist at the time. It would be an anomaly in the law to make good moral character a prerequisite to admission to an office of a life tenure, while no provision for removal is made in case such character is wholly lost. To provide for such a case, section 59 (supra) was enacted. That section would be wholly superfluous upon any other interpretation. Section 60 would confer all the power that, according to such an argument, is possessed by the Court. It is true that, to warrant a removal, the character must be bad in such respects as to show the party unsafe and unfit to be intrusted with the powers of the profession. There are many vices that render the character more or less bad that have no such tendency. But a want of credibility upon oath does not come within this class. Where there can be no reliance upon the word or oath of a party, he is manifestly disqualified, and, when such fact satisfactorily appears, the Court not only have the power, but it is their duty, to strike the party from the roll of attorneys. The various cases of removal, after conviction of crime, which have been made, can only be sustained upon this view.

It is further insisted that the Court has no right to call upon an attorney to answer charges of this description, for the reason that it compels him to give evidence against himself. The answer to this is, that the party is not compelled to be sworn at all, unless he chooses. He may introduce his other evidence, tending to show his innocence, and submit the matter to the Court, without being sworn.

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The order appealed from must be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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ELIZABETH READ, Respondent, v. THE CITY OF BUFFALO, Appellant:

Judgment of de facto Judge cannot be collaterally impeached.

It is sufficient to sustain a judgment that the Judge presiding at the trial and judgment was a de facto judge at the time. His judicial acts, so far as they affect third parties, cannot be collaterally impeached.

Appeal from the Superior Court of the city of Buffalo. The action was upon a judgment for $77.20, recovered in Justice's Court in that city (before Justice Merrill), on the 3d of January, 1856.

The cause was tried before Judge Clinton, without a jury, and the only question involved was whether Merrill was a magistrate, either de jure or de facto, at the time the judgment was rendered.

The material facts were these: In January, 1852, Mr. Merrill entered upon the discharge of his official duties, having been duly elected as a justice of the peace in and for the city of Buffalo, for the full term of four years. His successor in office was elected for a like term in November, 1855, and did not qualify and enter upon the discharge of his official duties until the first Monday in January, being the seventh day of that month, and the time fixed by law as the commencement of his term of office.

On the 22d of December, 1855, the Plaintiff commenced an action against the city, before Justice Merrill, for the destruction of her private sewer. Issue was joined, and the trial was commenced on the 29th of December. Before its conclusion, the cause was adjourned to the 31st of December, when it was again adjourned, by consent, to the 2d of January. On that day the Defendant did not appear, and the Plaintiff obtained a continuance until the following day, when the trial was concluded, and judgment was rendered for the Plaintiff.

The judge held that the term of office of the justice expired on the 31st of December, and, being of opinion that the judgment was void, he dismissed the Plaintiff's complaint. The

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Plaintiff appealed, and the judgment was reversed at the General Term, and a new trial ordered—all the judges being of opinion that Merrill was a magistrate de facto, if not de jure. The opinion of the Court was delivered by Masten, J.

The Defendant appealed from the order granting a new trial, stipulating for judgment absolute in favor of the Plaintiff, in case of affirmance in this Court.

George S. Wardwell for Appellant.
Wm. H. Greene for Respondent.

PORTER, J.—As the law stood when Merrill was elected, his term of office extended to the 1st day of January, 1856. In the amended charter of the city of Buffalo, which was adopted in 1853, the Legislature designated the first Monday of January as that on which, thereafter, the term of justice and other city officers should commence. Under this provision the justice assumed that his time did not expire until the commencement of the term of his successor in office, and he accordingly continued to discharge his duties as a magistrate until he was succeeded by the new incumbent, on the first Monday of January. The theory of the Defendant is, that his term expired on the last day of December, and that the effect of the change in the charter was to produce an interregnum of a week, during which, so far as this office was concerned, the administration of justice in the city of Buffalo was suspended.

It is unnecessary to determine the question whether the magistrate was right in retaining his place until the qualification of his successor. It is sufficient that he was an officer de facto, discharging the duties of his position under color of legal title. His judicial acts, so far as they affected only the rights of other persons, were not subject to collateral impeachment, on the ground that he was no longer a magistrate de jure. The office was continuing in its nature, and, as he was in undisputed possession, under apparent authority of law, his title could only be questioned in a proceeding directly involving that issue. The rule on this subject is founded on considerations of public policy, and its

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maintenance is essential to the preservation of order, the security of private rights, and the due enforcement of the laws (Parker *v.* Baker, 8 Paige, 428; Weeks *v.* Ellis, 2 Barbour, 320; Greenleaf *v.* Low, 4 Denio, 170; Wilcox *v.* Smith, 5 Wendell, 233).

The order granting a new trial should be affirmed, with judgment absolute for the Plaintiff.

All the judges concurring,

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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JOHN M. BRUCE, JR., AND OTHERS, APPELLANTS, v. JAMES S. DAVENPORT, AND OTHERS, RESPONDENTS.

Contract—Discovery of Fraud—Time of Disaffirmance.

It is the duty of a party who proposes to disaffirm as fraudulent a contract entered into by himself, partner, or agent, to do it at once, upon discovery of the fraud.

If, after discovering the fraud by which he was induced to enter into the contract, he remain silent, or inactive, and give no intimation of a purpose to disaffirm until he finds the contract likely to prove unprofitable, he will then be estopped from disaffirmance.

One of the partners of a firm in the absence of his partner was, by false representations, induced to endorse a note in the name of the firm. On the return of the partner, the fraudulent representations were discovered, and the partners were dissatisfied with the party procuring the endorsement, but they gave no notice of disaffirmance for the period of three months, and further availed themselves of the benefits of such endorsement: Held, the firm was bound thereby.

THE action was brought by the Appellants against the Respondents as endorsers of a promissory note for $2,350.62, made by a firm doing business under the name of Beale, Mellick & Dewitt. The defence relied upon was that the note in question was, previous to its maturity, delivered by Thomas Davenport, one of the Respondents, to the Appellants, to be sold by the latter, who were note-brokers, as it was, and that the Appellants afterward procured the note to be endorsed in the firm name of "Davenport Bros.," while Thomas Davenport was absent, by James S. Davenport, another of the Respondents, who was ignorant of the instructions which, as is alleged, were given to the Appellants by Thomas Davenport at the time he delivered the note to them, and that such endorsement was procured by an alleged false representation of William A. Odell, one of the Appellants, to the effect that Thomas Davenport would endorse the note were he at home, and that he usually did endorse notes of that kind left with the Appellants for sale.

The referee found as facts, that within a few days after the delivery as aforesaid of the note in question to the Plaintiffs, Odell, one of the Plaintiffs, called at the Defendants' place of business. Thomas Davenport was then absent.

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Odell found the Defendant, James S. Davenport, there, and requested him to endorse this note in the name of the Defendants' firm.

J. S. Davenport at first declined doing so, saying that Thomas Davenport attended to this part of the business, and that he knew nothing about it.

Odell then stated to him that Thomas Davenport was in the habit of endorsing the name of his firm on the paper of those makers; that he invariably did so; that he would endorse this note if he were at home, and that if J. S. Davenport endorsed it he would find it all right when Thomas Davenport returned; that the Plaintiffs could sell the note if the Defendants endorsed it, but not otherwise. The Defendant, J. S. Davenport, induced by these statements of Odell, then endorsed the note in the name of the firm.

In a day or two after J. S. Davenport thus endorsed the note, Thomas Davenport returned, and on being informed by J. S. Davenport of the representations and of the endorsement, expressed his dissatisfaction, and said he would not have endorsed it for five hundred dollars; and J. S. Davenport expressed indignation at having been induced to endorse the note by the statements, as above mentioned, of Odell.

The Defendants did not express dissatisfaction to the Plaintiffs as to the endorsement, or the means by which it was obtained, till it was ascertained that the makers were insolvent.

The referee reported in favor of the Plaintiffs for the balance due on the note, after deducting a payment made by the assignee of the maker, holding that the statements made by Odell were not such false representations as would invalidate the contract of endorsement, in that they were promissory; in that the statements contained no warrant of the condition or ability of the makers of the note; in that the statement was not one that a person of ordinary prudence should have relied upon; and in that the representations, in a legal sense, caused no damage to the Defendants, as they are in no worse position than if they had not sold the note, but had retained it till maturity.

The General Term of the First District reversed the judgment

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of the referee, and ordered a new trial, and directed that the testimony taken on the former trial might be read in evidence on the new trial.

The Plaintiffs appeal to this Court, stipulating that, if the order appealed from be affirmed, judgment absolute may be entered against them.

Jas. C. Carter for Appellants.
Wm. W. Niles for Respondents.

HUNT, J.—We are not at liberty to deny the finding of the referee, that the Defendants' endorsement of the note in suit was obtained by the false representations of Odell.

The representations were false, but they are not found to be fraudulent. Whether this question of fraud was one of fact which should be found by the referee, or whether it would be held to be a question of law under Bennett *v.* Judson (21 N. Y. R. 238), is not, in my view of the case, a material question. Assuming that the transaction was fraudulent, and that the representations were such as might well have deceived a prudent man; assuming, also, that a representation to one partner of what his associate would do, if present, comes within the rule on this subject (as to which see 1 Story's Eq. Jur. § 199), there is a further difficulty, which cannot be overcome.

This arises from the failure of the Defendants promptly to repudiate the endorsement, when informed of the means by which it was obtained. The absent partner returned to his place of business within a few days after the endorsement was obtained, and was informed of the means and representations employed by Mr. Odell to obtain it. Great indignation was expressed by the partners, among themselves, at his conduct.

No disaffirmance, however, of the transaction, no offer to return the money and take back the note, or even a disapproval or complaint of the means employed, was made to the Plaintiffs. The Defendants, on the contrary, received and retained the proceeds of the note, and were content to remain as they were, for a period of nearly three months. The insolvency of the maker, at that

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period, occurred, and for the first time the Defendants then communicated to the Plaintiffs the complaint that their endorsement had been fraudulently obtained.

This will not do. It is the duty of a party who proposes to disaffirm, as fraudulent, a contract entered into by himself, his partner, or agent, to do it at once, upon the discovery of the fraud.

He must be ready and prompt in such disaffirmance. It will not do to keep the money in his pocket for three months, to deprive the other party of the opportunity of protecting himself, to await the chances of a successful performance of the fraudulent contract, and only to repudiate when the danger of loss becomes imminent.

Neither honesty, good faith, nor the principles of law, will justify such a course.

If the Defendants deemed themselves injured by the representations of Mr. Odell, it was their duty, upon the return of the absent partner, when the real facts were made known to all of them, at once to have tendered to the Plaintiffs the money received from them, and to have demanded a return of the note.

For illustrations of these principles, see Minturn *v.* Main, 3 Seld. 220, 227; Sar. & Sc. R. R. *v.* Row, 24 Wend. 74; Lloyd *v.* Brewster, 4 Paige, 537; Conner *v.* Henderson, 15 Mass. R. 319; Cutler *v.* Gilbreth, 53 Maine R. 176.

Upon this ground, I think, the judgment of the referee should be affirmed, and that of the General Term reversed.

That portion of the order directing that the testimony already taken might be read in evidence on the new trial was unauthorized and irregular. The new trial, as awarded by the General Term, was his right. He was entitled to it, without condition or qualification.

A direction that evidence of a certain character should be admitted was not a legal condition.

All the judges concurred.

Order for new trial reversed.

JOEL TIFFANY,
State Reporter.

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WILLIAM BARKER v. WILLIAM WHITE AND OTHERS.

Equity—Costs in Discretion of Court awarding them—Evidence, Conflict of—Appeal.

In suits in equity, the giving or withholding of costs is in the discretion of the Court, which discretion, except in cases of abuse, the Appellate Court will not attempt to control.

Where there is conflicting evidence upon a material fact before the Court, referee, or jury, the finding thereon is conclusive, and cannot be questioned by the Court.

W. R. & S. H. Stafford for Appellant.
G. R. & T. D. Petton for Respondents.

BOCKES, J.—This action was in equity, by one member of a partnership to enforce certain claims against the other members, growing out of the firm business.

It was referred to a referee to hear and determine, who reported in favor of the Plaintiff as to one claim, and against him as to the other; and the referee adjusted the costs between the parties, by allowing them in part to the Plaintiff, and in part against him to the Defendants.

Judgment was entered as directed by the referee. The Plaintiff appealed therefrom to the General Term, in so far as his claim set forth in the complaint was disallowed, and also as to the adjudication of the question of costs. The judgment was affirmed at General Term, and the Plaintiff appealed to this Court.

In the complaint the Plaintiff charged that during the continuance of the partnership one of the firm, George W. Sherman, now deceased, whose estate is represented in this action by his administratrix and administrator, had in his possession the sum of six hundred dollars, which belonged to the firm, and which sum he loaned to one Albert Rogers, on his own individual responsibility, promising to make the sum good to the firm; that

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such sum had never been repaid to the firm; and he claimed that Sherman's estate should be charged with this sum and interest.

The referee found in favor of the Plaintiff on this allegation, and allowed a recovery in his favor, and against Sherman's estate, for his proportion of the claim. In this determination of the referee the parties acquiesced, neither appealing therefrom. This branch of the case, therefore, requires no examination.

The Plaintiff also charged in the complaint that during the continuance of the copartnership he lent and advanced to the firm, of his own individual funds, the sum of one thousand dollars, which sum was used in the partnership business, and that the firm gave him a promissory note therefor, dated "April 24, 1854," signed in the firm name, and that he still held the same, which was due and wholly unpaid; and he claimed that this sum should be charged against the members of the firm, respectively, in due proportion.

This allegation of the complaint was denied by the other parties; and they averred, on information and belief, that if any such paper existed it was made and placed in the Plaintiff's hands for a special purpose, to which it was never in fact appropriated, and that it never had any legal existence as a valid instrument binding on the firm.

The litigation before the referee was confined principally to this branch of the case, and the appeal was brought to review the decision of the referee thereon.

The note described in the complaint was produced by the Plaintiff, and was put in evidence.

The signature was shown to be in the handwriting of Mr. White, a member of the firm.

The Plaintiff gave evidence tending to prove that the note was given him for money loaned, as alleged in the complaint.

On the other hand, the evidence offered by the Defendants tended strongly to contradict the Plaintiff's case, and left it quite doubtful, if not entirely improbable, that the note was given under the circumstances and for the purpose asserted by the Plaintiff. The evidence certainly made it a question of fact for

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the referee. He found emphatically against the Plaintiff—that he did not lend or advance the one thousand dollars to the firm, nor did the firm make and give him the firm note, as alleged in the complaint; nor was that sum due and owing to him from the copartnership; and while he found that the note was signed by the firm name, in form as stated in the complaint, yet he also further found that it was never held and owned by the Plaintiff, as claimed by him. This finding of fact on the evidence must be held conclusive on the parties, and as a consequence determines the case against the Plaintiff, in so far as he made a claim against the other members of the firm, or the note. His case was not sustained on this point of the litigation, and the judgment in that regard was properly affirmed by the General Term.

No other question is raised on this appeal on the merits.

It is insisted hence that the referee erred in the adjustment of the costs between the parties. The action being in equity, the giving or withholding of costs was in the discretion of the referee. As a general rule, the Court will not attempt to control that discretion on appeal; certainly not except in case of its palpable abuse.

Such is not this case.

The Plaintiff failed in the action on the principal subject of litigation; recovering, however, on one minor branch of it. He was allowed his costs of the action, excepting two-thirds of the disbursements, and was charged with the costs of White's defence.

We cannot see that the adjustment of the costs between the parties was so unfair and inequitable as to require this Court to interfere with the decision of the referee.

The judgment of the Supreme Court should be affirmed, with costs of the appeal against the Appellant.

All concur.

Affirmed.

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GROVER, J.—None of the exceptions of the Plaintiff to the admissibility of evidence were well taken. It was claimed by the Plaintiff that he had loaned his firm, consisting of the parties to the suit, one thousand dollars, for which the note was given. The circumstances under which this note was presented by the Plaintiff, his entire forgetfulness at the time as to the origin of the note, its consideration, or how he came by it, were calculated to create a doubt as to the truth of the story subsequently told by him—that he kept large sums of money in his house, in the custody of his wife, from which this money was taken. This story was of itself very suspicious. This rendered an inquiry into the pecuniary condition and dealing of the Plaintiff, at about the time, admissible, for the purpose of showing whether the Plaintiff had in fact any such sums of money as claimed by him. All the evidence excepted to was proper for this purpose. The question whether the Plaintiff lent the thousand dollars to the firm, and took the note in question, therefore, was one of fact; and if the evidence was at all conflicting, the decision of the referee cannot be reviewed in this Court. It was undisputed that the signature of the firm to the note was in the handwriting of the Defendant White, one of the firm. Had there been no other evidence, it would have presented a question of law merely; and, had the referee found the fact contrary to the undisputed evidence, it would have been a legal error that this Court would correct upon appeal. But there was other evidence tending strongly to show that the note was not valid against the firm.

In this class of cases this Court has no power to inquire into the weight of the evidence, and determine whether the Court below has come to a correct conclusion thereon. That can only be done by the Supreme Court. In this case the Plaintiff concedes that costs were in the discretion of the Court.

There is no evidence of abuse in its exercise. There is no grounds for the interference of this Court with the disposition in this respect made by the referee.

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The judgment appealed from should be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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HENRY RAWLS AND CHARLES S. SEYMOUR, RESPONDENTS, v. JOHN G. DESHLER, APPELLANT.

Innocent Persons—Loss by Third Party—Which shall sustain?

Whenever one of two innocent persons must suffer by the acts of a third party, he who has enabled such third party to occasion the loss must sustain it. When a party sells a cargo of corn and allows the purchaser to take the corn, ship it, receive a bill of lading therefor, and draw upon his consignee with bill of lading attached to the draft, such vendor will not be allowed the right of stoppage in transitu to obtain payment, when by so doing the consignee is to suffer for his acceptance and payment of such draft.

John Gansen for Appellant.
H. C. Day for Respondents.

DAVIES, CH.J.—On the 18th of September, 1860, one A. L. Griffin, of Buffalo, purchased of the Defendant a quantity of white corn. The Defendant had the corn on storage at the Hatch Elevator. He gave Griffin an order for the corn in these words:

Buffalo, Sept. 18, 1860.

Hatch Elevator.

Deliver A. L. Griffin, Esq., or order, 4,328$\frac{47}{100}$ bushels white corn, cargo Potomac, subject to my order until paid for.

JOHN G. DESHLER.

The corn was delivered to Griffin on production of this order, and he, Griffin, shipped the corn, on the 18th of September, on board a canal-boat at Buffalo, and received the following bill of lading:

Buffalo, Sept. 19, 1860

Shipped in good order, by A. L. Griffin, on board of canal-boat L. B. Trowbridge, B. T. Co. Line, —— master, the following articles, to be carried under deck and delivered in like good order, as addressed, without delay, towing day and night, damages and deficiency to be deducted from charges by consignors.

Acct. A. L. Griffin or order.

4,328$\frac{47}{100}$ bushels white corn, care Rawls and Seymour, New

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York. Freight to New York 14½ c. per bushel, free of lighterage, consignees paying towing. JAMES VAN BUREN,
per NOBLE.

Entered Sept. 21, 1860.
Endorsed, A. L. GRIFFIN.

It appeared that Van Buren had an office in Buffalo, and carried on business there under the name of The Buffalo Transportation Company; that Van Buren was a public carrier, and had a regular line, and had an interest in some of the boats; he was what they call a scalper; he gets a cargo from the owner, and gets a boat to take it, and receives a commission from the boats; that Noble was the agent of the company, and had authority to sign the bill of lading.

On the 19th of September, 1860, Griffin advised the Plaintiffs of the shipment of corn to them, and that he had drawn on them for the corn. This letter the Plaintiffs received in New York, on the morning of September 20. On the 19th of September, 1860, Griffin drew a draft upon the Plaintiffs for $2,120, and annexed thereto the bill of lading, signed by Van Buren, and on that day procured the said draft to be discounted by the White Bank, in Buffalo, and received the avails thereof. This draft was presented to the Plaintiffs for acceptance in the city of New York, with the bill of lading attached, on the 20th of September, by the correspondent of the White Bank, and on the 21st was accepted by the Plaintiffs, and subsequently paid by them.

The Defendant intercepted the boat upon which the corn was laden at or near Rochester, while on its transit to the Plaintiffs, and, through the instrumentality of proceedings in replevin, obtained possession of the corn, and sold and converted the same to his own use.

The action of replevin was instituted in the name of this Defendant against Griffin, and C. H. Wendt, the captain of the boat upon which the corn was laden. Griffin was not served with any process in the case, and Wendt, upon whom the summons was served, made default, and judgment passed against him accordingly.

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The Plaintiffs now bring this action, claiming to be the bonâ fide owners of said corn, to recover the value thereof. On the trial, in the Buffalo Superior Court, the jury were directed by the judge to render a verdict for the Plaintiffs, and judgment thereon was affirmed at the General Term.

It may be concluded that as between Griffin and the Defendant the title to the corn did not pass to Griffin until the same was paid for. Notwithstanding this, the Defendant intrusted Griffin with the possession and control of the property. There is some evidence tending to show that the sale was in fact a sale upon credit, and that both parties understood that the money to pay the purchase price was to be raised by a shipment of the corn by Griffin, and the discount of a draft drawn on the faith of the bill of lading thereof. The Defendant himself testified on the trial: "It happens very often on the dock that purchasers buy grain and get the bill of lading, and raise money on it to pay the purchase price; that witness knew Mr. Griffin did that business." Taking the most favorable view of the facts for the Defendant, both he and the Plaintiffs are innocent sufferers from the fraud or defalcation of Griffin. Assuming they both occupy that position, which should suffer for his acts? The rule on this subject was clearly enunciated by Ashurst, J., in Lickbarrow v. Mason (2 T. R. 63), and has been universally recognized and followed since: "Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Applying this doctrine to the present case, we have no difficulty in saying the Defendant must sustain the loss occasioned by the act of Griffin, and not the Plaintiffs.

The Defendant intrusted Griffin with the corn, and gave him the indicia of title. He was therefore enabled to deal with it as his own. He shipped it in the usual course, consigned to the Plaintiffs, received a bill of lading therefor, which was negotiable, and did negotiate it, and the Plaintiffs became the owners and holders thereof in good faith and for a valuable consideration. Such negotiation of the bill of lading and transfer thereof to the Plaintiffs constituted them bonâ fide holders and owners of

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the corn, and the Defendant's right of stoppage in transitu, for the purchase-money, was cut off and terminated (Lickbarrow v. Mason, supra; Holbrook v. Vose, vol. 4, Am. Law Reg., new series, notes 9 and 10, and cases there cited).

It is difficult to withdraw this case from the doctrine of Hollingsworth v. Napier (3 Caines, 182); and the leading and controlling facts in each are nearly identical. Napier sold to one Kinworthy, from whom the Plaintiff derived title, ten bales of cotton, under the following circumstances:

The cotton was lying in the public store, at the quarantine-ground at Staten Island, and the Defendant sold it to Kinworthy in the city of New York, "for cash payable on delivery." Defendant made out a bill of parcels for the cotton, marked in the margin "cash," but containing no receipt for the money. This, together with an order on the storekeeper for the cotton, had, either by the Defendant or his clerk, been delivered to Kinworthy. He, without either paying for the articles, or having taken possession of them, met the Plaintiff at a public house, and producing the bill of parcels and order, offered them for sale, at the same price for which they had been bought, alleging as a reason that he had been pushed for money. The Plaintiff on this agreed to become the purchaser, received the bill of parcels and order, and paid for the goods, by giving part in cash and the balance in a check of a third party. Having made the purchase, the Plaintiff went to the quarantine-ground the next day, but at so late an hour that in the usual course it was impossible to have the goods shipped that night, and, producing the order, demanded the cotton, on the turning out of which to him he paid the amount of the storage, had the bales marked with the initials of his name, and then returned them into the store.

The morning after this, the Defendant went to the quarantine-ground, took the cotton and sold it, and the Plaintiff brought trover to recover for the value of his cotton thus converted. The Plaintiff had a verdict, and the Supreme Court refused to grant a new trial.

The principles settled in the case of the Bank of Rochester v.

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Jones (4 N. Y. 497), would seem to be decisive of the present case. In July, 1843, Foster applied to the bank to borrow $950, for the purpose of buying two hundred barrels of flour of W. Ely. The cashier refused to make the loan without security. Foster proposed to procure the forwarder's receipt for the two hundred barrels of flour to be purchased with the money received from the bank, on the loan, and to leave such receipt with the bank as security for the acceptance of the draft, to be drawn on the Defendant. Foster delivered the draft and the forwarder's receipt to the cashier, and the bank discounted the draft. The bank forwarded the draft, with the receipt attached, to their collecting agent at Albany, to be presented to the drawer, Jones, for acceptance. Jones took off the receipt, and refused to accept the draft. Jones received the flour, and, before the commencement of the suit, the bank demanded the flour of Jones. The bank recovered, and the following propositions may be considered as settled by this Court.

1. The delivery of the carrier's receipt to the bank was a symbolical delivery of the flour.

2. The delivery of the carrier's receipt or bill of lading to the bank, for a valuable consideration, passed to the bank the legal title to the same.

In the present case the White Bank had the legal title to this corn, and the Plaintiffs, by the acceptance and payment of the draft of Griffin, and the delivery and transfer to them of the bill of lading, succeed to all the rights of the bank, and the legal title to the flour passed to them. It is insisted, on the part of the Appellant, that the instrument produced was not properly a bill of lading, as it was not signed by the master of the boat.

In Dows v. Greene (32 Barb. 490) the bill of lading was signed by the agent of Miles & Walker, who were partners, dealing in produce, and agents of a Transportation Company, and members thereof. Bloss obtained the bill of lading in good faith, who transmitted it to one Mack, who obtained from the Plaintiffs in that action an advance upon the faith thereof. The Supreme Court held that the instrument under which the Plaintiffs claimed

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was a bill of lading. If not exactly formal, it was substantially such. It did not detract from its force or validity that it purported to be the act of the owners of the goods, and also of the carrying vessel, instead of their agent, the master or captain. Not only from its similarity to other bills of lading has this been argued to possess the character of such a paper, but this very instrument has in several instances been adjudged to be a bill of lading. That question is, therefore, no longer open for discussion (citing Dow v. Perrin, 16 N. Y. 325; Dows v. Greene, 16 Barb. 72; Dows v. Rush, 28 Barb. 183; Bank of Rochester v. Jones, 4 N. Y. 497; to which may be added Dows v. Greene, 24 N. Y. 638).

In this connection, the remarks of Baron Parke, in Bryans v. Nix (4 Meeson and W. 790), are apposite and conclusive. He says: "The true question is, what is the meaning and effect of the two documents, by whatever name they are called, coupled with the letter from Tempany of the 2d of February, followed by the acceptance by the Plaintiffs of Tempany's draft? It seems to us to be clearly this—that Tempany agrees that the oats therein specified shall be held from that time by the boat-masters for the Plaintiffs, in their own right, provided they accept the bill as a security for its payment; that the masters agree so to hold them, and that, by the Plaintiffs' assent and acceptance of the bill, the conditional agreement becomes absolute. The transaction is in effect the same as if Tempany had deposited the goods with a stakeholder, who had assented to hold them for the Plaintiffs in order to indemnify them. As evidence of such a transaction, it is wholly immaterial whether the instruments are bills of lading or not; and it might equally be proved through the medium of carriers' or wharfingers' receipts, or any other description of document, or by correspondence alone. If the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels, is established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier or shipmaster employed by the consignor or a third person, and the chattels are so placed on account of the person who

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is to have that property, and the depositary assents, it is enough; and it matters not by what documents this is effected; nor is it material whether the person who is to have the property be a factor or not, for such an agreement may be made with a factor as well as any other individual."

In De Wolf v. Gardner (12 Cush. 19), Ch.J. Shaw cites this case with approval. It seems to me that the principles settled in the case of Dows v. Greene, and affirmed in this Court, establish the Plaintiffs' right to recovery. In Crocker v. Crocker (31 N. Y. 507), this Court held that where a Plaintiff, by his own voluntary act, has, through misplaced confidence, conferred the apparent right of property in bank stock upon a third party, a bonâ fide purchaser of such stock from such party will be protected against any secret trust in favor of the Plaintiff. In that case a learned judge of this Court said: "The Plaintiff had, by his own voluntary act, caused Stephen Crocker to be invested with the legal title to the stock, and suffered him to deal with it as his own for years. Having through misplaced confidence conferred on him the apparent right of property as owner, a bonâ fide purchaser of the stock from him, in the course of commercial dealing, without notice, would be protected in his title against any latent equities of the Plaintiff. Foster and Livingston and Skinner & Co. lent their notes and acceptances to Stephen Crocker on the credit of the stock transferred to them, without notice of the secret trust in favor of the Plaintiff, and were bonâ fide purchasers—for the term 'purchaser,' in this connection, includes 'one who advances or incurs responsibility upon credit of property.'" In Wait v. Green, decided in this Court at March Term, 1867, a Mrs. Comins owned a horse and sold it to one Billington, and delivered the same to him, taking his note for the amount of the purchase, with a memorandum at the foot of it "that the title to the horse was to remain in Mrs. Comins until the note was paid." Billington sold the horse to the Defendant, for value, and without notice, and he was a bonâ fide purchaser. Mrs. Comins sold the note to the Plaintiff, and the same not being paid at maturity, he demanded the horse of the Defendant, and on refusal brought this action to

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recover the value of the horse. This Court held that the Defendant had acquired a good title to the horse, and that the Plaintiff could not recover. Opinion by Bockes, J.

If there could be any doubt on this point, I am unable to see why the first section of the Factors Act does not meet this precise case (Laws of 1830, chap. 179, p. 203). It is as follows: "§ 1. After this act shall take effect, every person in whose name any merchandise shall be shipped shall be deemed the true owner thereof, so far as to entitle the consignee of such merchandise to a lien thereon; 1st, for any money advanced, or negotiable security given by such consignee, to or for the use of the person in whose name the shipment shall have been made." Now, in the case at bar, all these requirements are combined:

1. There was a shipment of merchandise, in the name of Griffin, consigned to these Plaintiffs.

2. The statute declares in such an event he, the shipper, is to be deemed the true owner of such merchandise.

3. These Plaintiffs advanced the amount of this draft to and for the use of Griffin, in whose name the shipment was made, and they have therefore a lien upon such merchandise for the money so advanced.

These Plaintiffs had no notice by the bill of lading, or otherwise, at or before the said advance of money, that the person in whose name the shipment was made was not the actual and bonâ fide owner of said merchandise. That lien was not divested or impaired by the action of Defendant in taking the corn from the canal-boat by the instrumentality of an action of replevin, or by the proceedings in that action. They were res inter alios acta, and not affecting the rights of these Plaintiffs.

The judgment of the Superior Court of Buffalo was correct, and should be affirmed, with costs.

Same *v.* same.

For the same reasons, the judgment in this action should be affirmed, with costs.

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Concurring: JJ. BOCKES, HUNT, PORTER, and WRIGHT.
Affirmed.
GROVER, J., for Reversal; PARKER, J., not voting.

JOEL TIFFANY,
State Reporter.

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JESSE M. EMERSON, SUCCESSOR OF ROBERT GRANT, DECEASED, ASSIGNEE OF WILLIAM MONTGOMERY, RESPONDENT, v. WILLIAM BLEAKLEY, JR., SHERIFF, &c., APPELLANT.

Trustee Dying—Substitution, what proper.

When the intestate held personal property as a trustee, under the common law rule it passes at his decease to his personal representatives, who are bound to execute the trust; and consequently they should be substituted in the place of the decedent. But when the Court appoints a trustee by the express consent and stipulation of these representatives, his appointment is a proper substitution.

ON or about the 17th day of December, 1859, one Alfred Booth obtained a judgment in the Supreme Court, Westchester county, against William Montgomery and William Garabrant for $2,268.38 on two promissory notes made by said "Montgomery & Co."

On the 20th day of December, 1859, the said Booth caused an execution on said judgment to be issued against the property of said Montgomery and Garabrant, to the Defendant in this suit, William Bleakley, Jr., who was at that time sheriff of Westchester county.

On the 20th day of October, 1857, a stock company was organized by William Montgomery and four others, by the title of the "New York Steam Saw-mill and Machine Company."

On the 21st day of October, 1857, one day after the date of the certificate of incorporation of said company, William Montgomery and George D. Lund (who had become a partner of Montgomery in the place of Garabrant), for the consideration of $100,000, made a bill of sale of "all the materials, good-will, and appurtenances of whatever kind or nature appertaining and belonging to the manufacturing and machine business heretofore conducted under the name of William Montgomery & Co., in the town of Yonkers, Westchester county, N.Y., together with the full right to the immediate occupancy of the premises in which said property was contained, in Yonkers," &c., &c., to the said New York Steam Saw-mill and Machine Company.

On the same day (October 21, 1857) said Montgomery and

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Lund executed another bill of sale to said Steam Saw-mill and Machine Company, for consideration of $15,000, "of all the steam saw-mills, steam-engines, boilers, machinery, and stock of all kinds manufacturing, or in process of manufacturing, appertaining to and belonging to the engine and machine manufacturing department of the business heretofore conducted under the name of Messrs. Montgomery & Co., together with all the belongings thereto," &c.

Montgomery became the president of this Machine Company on its organization, and always continued such president, and had the management and direction of its business.

Montgomery & Co. had a lease of the factory premises for five years from May 1, 1855, which passed to the Machine Company under the bill of sale first above mentioned.

On the 23d day of December, 1858, an agreement was entered into between Montgomery and certain others of the stockholders of the said Machine Company, by which said Montgomery was to become possessed of their stock on certain conditions, which it is claimed were never performed by Montgomery.

Montgomery, the 29th day of November, 1859, executed a general assignment for the benefit of his individual creditors, to Robert Grant, of "all the estate and property, real and personal, of him, the said William Montgomery, either individually, or as a member of the late firm of Montgomery & Co., or a corporator or stockholder of the New York Steam Saw-mill and Machine Company."

Under this assignment Grant claimed title to the property in question. And as the Defendant, as sheriff, had in the first instance levied upon said property, under the said execution of Booth, against Montgomery and Garabrant, this action of replevin was brought by Grant.

On the trial, the jury found that the stock and materials belonged to Robert Grant, valuing the same at $13,233.81; and that the tools and fixtures belonged to the Steam Saw-mill and Machine Company, valuing the same at $13,188; and judgment has been ordered in conformity with such findings, and has been

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affirmed by the General Term of the Second District. Robert Grant died September 28, 1861.

R. W. Van Pelt for the Appellant.

W. R. Stafford for the Respondent.

PARKER, J.—I think there was no abatement of the action by the death of Grant, the original Plaintiff. The cause of action survived by virtue of the statute (2 R. S. 447, § 1, 1st ed.); Webbers' Exrs. *v.* Underhill, 19 Wend. 449); and this being so, section 121 of the Code saves the action from abatement.

Although Grant held the property in question as a trustee, on his death it passed, under the common law, to his personal representatives, who were bound to execute the trust (De Peyster *v.* Ferrers, 11 Paige, 13). We held in the case of Baum's Exr. *v.* Vaughn, decided at the last term of this Court, that § 68 of the article of the Revised Statutes relative to uses and trusts (1 R. S. 730, 1st ed.) does not relate to personal property, and that the common law rule above referred to still exists, and applies in reference to such property.

The consequence is, that on the death of Grant the title to the property passed to his legal representatives, who, unless they had transferred it to Emerson, should have been substituted. But the appointment by the Court of Emerson to execute the trusts of the assignment, and his substitution as Plaintiff in the action, having both been made by the express consent and stipulation of the Defendant, set forth in the case, I am inclined to think his motion for a dismissal of the complaint, upon the trial, on the ground that the title to the property was in the personal representatives of Grant, was properly denied. Non constat that the cause of action had not passed, by assignment, from the personal representatives of Grant to Emerson. In that case he was the proper person to be substituted; and I think, as against the Defendant under his stipulations, such assignment should be presumed.

The question of the grounds on which the nonsuit was claimed, to wit, that Grant was not the owner of the property

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when the suit was brought, and that it was incompetent for Montgomery to make any transfer to himself, were also properly regarded as not well taken; the first as involving a question of fact for the jury, and the other as not covering the whole of the Plaintiff's claim.

The objection to the introduction of Grant's testimony on the former trial was properly overruled. It was but the common case of reproducing the testimony of a deceased witness. I see nothing in the objection that he was a party. He was also a witness, and therefore within the rule allowing proof of what he testified to be given.

The inquiry of the witness, Montgomery, whether he received any directions from Grant in regard to the property, immediately after the delivery of the assignment, was relevant and proper as part of the res gestæ.

The question to the same witness, as to what was done with moneys which, he had stated, were realized from a portion of the assigned property, was also properly allowed.

I see no error in the rulings in regard to the questions put to the witness, Lund, as to his delivery, when he left, of the stock, &c., at the machine shop, to Montgomery, and as to his ever again exercising any acts of ownership over the property. This was clearly pertinent to the question which was litigated, whether Montgomery owned the property or any part of it.

The offer of the Defendant to prove that the sheriff of Westchester levied upon the property in question as the property of the Steam Saw-mill and Machine Company, after this suit was brought, was wholly irrelevant and immaterial, and was properly excluded.

The Court was requested to charge "that if the sheriff (Defendant) was found in the actual possession of the property levied on under the Booth execution, the Plaintiff must prove a demand of said property, and refusal to surrender it, before he can recover" what was refused.

If the property belonged to the Plaintiff, the taking it out of the possession of Montgomery, who was the Plaintiff's agent,

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using it in the Plaintiff's business, in hostility to the Plaintiff's right to it, was a wrongful taking as against the Plaintiff (Clark v. Skinner, 20 J. R., 465); and no demand was necessary (Cummings v. Vorce, 3 Hill, 282; Dunham v. Wyckoff, 3 Wend. 280). The request was therefore properly refused.

As to the Defendant's request, to charge that Montgomery, while acting as president of the Machine Company, could not become the purchaser of its property, if objected to by any stockholders or creditors of the Company, there was nothing in the evidence calling for such instruction to the jury, nor for anything more on that subject than the Court had already said to them; for they had been already instructed that, as to all that portion of the property in question which had been transferred to the Machine Company, and which had been acquired by said Company, the title to it remained in the Company at the time of the assignment, and did not pass to Grant, and that Montgomery's interest in such property, at the time of the assignment, was a stockholder's interest only, and that only such interest passed by the assignment, so that the additional instruction requested was entirely uncalled for.

The complaint now made by the Plaintiff's counsel, that, under the charge of the Court, it was the duty of the jury to render a verdict for the Defendant as to all the property in question, and that the Court below should, on that ground, have set aside the verdict, is not one which this Court can listen to or consider. The case is not open to us for an examination of the facts.

The finding by the jury that Grant was the owner of that portion of the property in question described as *stock and material*, and not of that described as *tools and fixtures*, rendered necessary a more specific description of the two classes. This the Court ordered to be made by directing the complaint to be amended so as to conform to the evidence, and to designate the portion of the property found for the Plaintiff described as stock and material, and the portion found for the Defendant described as tools and fixtures, to which the counsel for the Defendant excepted. And thereupon the Plaintiff did amend the complaint by inserting at

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the end of the list of articles a list of those which he denominated *tools* and *fixtures*, and stated that the residue of said property was known as stock and material. No fault was found with the manner in which the distributing was made and the amendment carried out.

I think it was competent for the Court to amend the verdict, as was in effect done for the purpose, not of adding or subtracting, but of specifying in accordance with the evidence, as was done in this case. (Sleght *v.* Hartshorne, 1 J. R. 149; 1 Sellon's Pr. 480; Archbold's Pr. vol. 1, 215; vol. 2, 275.)

Upon the whole case, I am of the opinion that the judgment should be affirmed.

Affirmed.

JOEL TIFFANY,
State Reporter.

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ABRAHAM B. HASBROUCK AND OTHERS, APPELLANTS, v. THE KINGSTON BOARD OF EDUCATION, ELIJAH ELLSWORTH, COLLECTOR, AND CORNELIUS BURHAUS, TREASURER OF THE KINGSTON SCHOOL DISTRICT, RESPONDENTS.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANTS, v. THE SAME DEFENDANTS, RESPONDENTS.

Injunction—Tax illegally assessed—Remedy what—Code, § 11.

An application for a preliminary injunction is addressed to the discretion of the Court; and although the Appellate Court may require the discretion to be exercised, it will not assume to control such discretion.

An order refusing to grant such injunction does not come within subdiv. 2 of § 11 of the Code of Procedure, and is not appealable to this Court.

It seems that an injunction cannot legally be granted to restrain the collection of a tax, although illegally assessed; the proper remedy is by action for damages, etc.

THESE appeals both embrace the same tax and raise the same questions. They are appeals from orders of the General Term, affirming orders at Special Term, denying motions for temporary injunction to restrain the collection of the same tax, and disbursement of the moneys.

The Kingston Board of Education was incorporated by an act of the Legislature, passed in 1863, and amended in 1864 (Laws of 1863, chap. 360; Laws of 1864, chap. 40), for the establishment and maintenance of free public schools in the Kingston school district; and the said act, as amended, provides that the said Board of Education shall have power, and it shall be their duty to raise, from time to time, by tax, to be levied upon all the real and personal estate in the Kingston school district, "such sums as they may determine to be necessary and proper for the payment of the salaries of the superintendent and teachers in the public schools under their charge, repairs of school-houses, fences, out-buildings, and grounds belonging thereto, and all other necessary and contingent expenses for establishing and maintaining the said public schools, and the necessary and contingent expenses of the Board of Education."

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The Board of Education, in the spring of 1866, determined that it was necessary and proper to raise by tax the sum of $22,000, to meet deficiencies of the last, and the expenses of the then current year, for the purpose aforesaid; and thereupon levied and assessed a tax for that sum, and delivered the tax-roll, with the usual warrant for its collection, on the fourth day of June, 1866, to the Defendant, Ellsworth, for its collection.

On the 16th of July, 1866, and after nearly $14,000 in amount of the tax had been collected, and a portion thereof disbursed, Abraham B. Hasbrouck and four others, in behalf of themselves and "all other taxable inhabitants and other persons having property liable to taxation in the Kingston school district," commenced the first above-entitled action against the Board of Education, their collector and treasurer, to restrain them from the collection of that part of the tax remaining uncollected, and from paying out, disbursing, and appropriating the moneys collected.

At the Special Term of the Supreme Court held in July, 1866, the Plaintiffs in the first-entitled cause applied for a temporary injunction, to restrain the collection of the tax and disbursement of the moneys collected during the pendency of the suit. That motion was denied, and the injunction refused. From that decision an appeal was taken to the General Term of the Third District. The order at Special Term was there affirmed, and from that affirmance an appeal was taken to this Court, and that is the appeal first above entitled.

After the denial of the injunction in the first cause, as above stated, an action was commenced in the name of the People, by the attorney-general, containing substantially the same allegations as those contained in the other cause, demanding judgment for a perpetual injunction to restrain the levy, assessment, and collection of any taxes by the Defendants, without the authority of the inhabitants, other than for certain limited purposes, and for those purposes not exceeding $5,000; and to restrain any further proceedings in the collection of the taxes then assessed, and disbursement of the moneys, and for other relief.

A motion for a temporary injunction to restrain the collection

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of the tax and disbursement of the moneys was made in that cause, and was denied. The order denying it was appealed from to the General Term.

The General Term affirmed the order, and an appeal was taken to this Court from the decision at the General Term, which is the appeal secondly above entitled.

E. Cooke for Appellants.

M. Schoonmaker for Respondents.

HUNT, J.—The objection is made, that the orders in question are not appealable to this Court. I think the objection is well taken.

It is claimed that the appeal is sustainable under sub. 2 of § 11 of the Code, which gives such appeal from "an order affecting a substantial right . . when such order in effect determines the action, and prevents a judgment from which an appeal might be taken," or discontinues the action, or grants or refuses a new trial. The order in question does not determine the action or prevent a judgment from which an appeal might be taken. It may possibly prejudice the Plaintiffs to the extent of that portion of the tax of 1866 yet uncollected; but the action remains with the question to be decided by it for future years, and with the power of appeal from the judgment to be rendered. If it shall be held ultimately that the Plaintiffs are right, then the Defendants, in their levies, will be restricted to $5,000 a year, or be limited to the specific items admitted by the Plaintiffs to be properly within their jurisdiction.

If the Defendants' view is sustained by the Courts, they will be at liberty the next year, and so long hereafter as the law shall remain unrepealed, to levy such sums as they may determine to be necessary and proper for the purposes specified in the act. There is evidently much the most important duty of the action yet to be performed.

The amount of the present tax, yet uncollected, is trifling compared with the amount which will be determined by the judgment yet to be rendered. The orders in question do not in

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effect determine the action, or prevent a judgment from which an appeal can be taken, and are therefore not appealable to this Court.

Again. The papers do not show whether the motion was denied upon the ground that the Plaintiffs could ultimately have no relief, or because a temporary interference was not advisable. In the latter case the motion below was addressed to the discretion of the Court; and the General Term having acted, we cannot review their determination (The People v. The New York Central R. R. Co., 29 N. Y. R. 418; Clark v. City of Rochester, 34 id. 355). Whether the interests of the individuals who had not yet paid their tax should command the interposition of that tribunal, or whether the interests of education were the more important in the particular case, were matters for the discretion and judgment of the Court below. In such cases we require them to act, but we do not assume to determine what their action shall be (auth. sup.).

I am of the opinion, also, that an injunction cannot legally issue to restrain the collection of a tax, although illegally imposed (Haywood v. The City of Buffalo, 14 N. Y. 534, 537; Mutual Benefit Life Ins. Co. v. Supervisors of N. Y., 32 How. 359).

The party must take his remedy by action for the damages he has sustained (ib.).

Upon the merits, I am also of the opinion that the action of the Board was legal. Section thirteen of the act in question, as originally passed, authorized the Board, and made it their duty "to raise, from time to time, by tax, ... such sum, not exceeding in all $5,000 in any one year, as they may determine to be necessary and proper, and such additional sum as the taxable inhabitants at an annual meeting may direct to be raised, not exceeding the like amount of $5,000 as aforesaid, for any and all of the purposes to which the powers and duties of the said Board extend, as hereinafter mentioned" (Laws 1863, p. 597).

The evident intent of this act was to limit the power of the Board to the sum of $5,000 as the amount authorized to be raised on their own discretion in any one year.

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If, however, the taxable inhabitants should think proper to order the raising of an additional sum of the like amount, then it became the duty of the Board to raise that amount also; all of which sums were to be applied indiscriminately to the purposes to which the powers of the Board extended.

In 1864 (ch. 40, § 1), the section in question was amended, so that it reads as follows: "§ 13. The said Board of Education shall have power, and it shall be their duty to raise, from time to time, by tax, to be levied," &c., "such sums as they may determine to be necessary and proper for the payment of the salaries of the superintendent and teachers in the public schools under their charge, repairs of school-houses, fences, out-buildings, and grounds belonging thereto, and all other necessary and contingent expenses for establishing and maintaining the said public schools, and the necessary and contingent expenses of the Board of Education. And they may also raise such additional sum, not exceeding $5,000 in any one year, as the taxable inhabitants of said Kingston school district may at any meeting, regularly called, authorize or direct, for the purchase of school-houses, lots or sites for school-houses, and to defray the expenses of the erection, altering, and improving school-houses, out-houses, and their appurtenances, or for such other purposes as are included within the powers and duties of the Board of Education as hereinafter mentioned."

Although there may be difficulty in giving an accurate grammatical or technical reading to this language, there is but little difficulty in ascertaining its meaning.

For the ordinary current expenses of maintaining the school system organized by the act, such as teachers' salaries, repairs of buildings, and contingent expenses, the Board were authorized to raise money in their discretion, and without limit as to the amount.

If it was desired to purchase school-houses, or lots on which to erect school-houses, or to alter or improve in a prominent manner the school buildings in use, permission or authority was to be obtained from the taxable inhabitants duly assembled. The fact

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that such meeting might direct the raising of moneys for other purposes included within the powers of the Board does not interfere with this construction. It was simply superfluous. The Board already had the power.

Neither do I see any difficulty to arise if it should be held that a like power was intended to be given to the citizens when regularly assembled as directed by the act.

Under the decision in Ketchum v. The City of Buffalo (14 N. Y. R. 361), the power "to establish and maintain schools" is very comprehensive, and if needed for that purpose would give large powers to the Board in question. There is no evidence in the present case that the Board have attempted to raise money for any other than legitimate purposes.

The adoption of the statement set forth in the complaint as the ground of their levy is expressly denied, and it is averred that the proposed levy was made for the purpose of providing for the payment of the salaries of the superintendent and teachers, repairs to the school-houses, and other contingent expenses, and to pay arrears for the same purpose, for which they were indebted. These were properly and legitimately within their control.

Both upon the form and upon the merits, I am of the opinion that the appeals should be dismissed, with costs.

All concur.

Appeals dismissed.

Wright and Porter JJ. not voting.

JOEL TIFFANY,
State Reporter.

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EDMUND SAVAGE v. THE CORN EXCHANGE FIRE AND INLAND INSURANCE CO.

Insurance—Carrier's Insurable Interest—Negligence must cause Damage.

A common carrier has an insurable interest in goods being transported by him to the extent of advances made, freight, and his legal obligations to the owner of the cargo, which is the fair value of the property carried by the contract of indemnity

Although the Plaintiff was guilty of negligence, it will furnish no defence unless such negligence contributed to the loss and damage complained of.

Where the damage consisted in the sinking of a boat loaded with grain and the injury to the grain, the extent of the damage involves the price of the grain at the place of the disaster.

BOCKES, J.—This is an appeal from the judgment of the Superior Court of the City of New York.

On the trial, the Plaintiff recovered, and the judgment was affirmed at General Term.

The action was brought on an open policy of insurance issued by the Defendants to the Plaintiff, which insured him "against any loss or damage he might sustain on cargoes, on account of himself or others, on his own boats, or boats belonging to others, and running in the New York and Indiana Line, by charter or on commission, loaded at Buffalo, or at other ports or places," to be entered on the policy.

The recovery was under this policy for the loss upon a cargo of corn, shipped at Buffalo, on the Plaintiff's canal-boats Fiske and Chipman, and insured from Buffalo to New York, with the privilege of transshipment from the said boats to the lake boat Hudson. The Hudson, to which the corn was transshipped, was placed at Albany in tow of the steamer Saratoga, to be towed to New York in the usual manner. The Plaintiff had no control of the steamer, or of its officers or crew.

On the passage to New York the Hudson struck a rock, by which holes were made in her bottom-planking. She immediately sunk. This injury occurred about midnight on Saturday, October 14, 1854, near Castleton, a short distance below Albany.

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The Plaintiff, who resided at Buffalo, received notice of the accident, and immediately, on Monday morning, informed the Defendants' agent, through whom the insurance was effected. The agent then assured the Plaintiff (as the latter testified) that the company would take charge of the cargo, and manage it themselves; that they preferred to do so. On the next day, Tuesday, the 17th, the Defendants appeared, took charge of the cargo, and removed and sold it on account of the company. The net proceeds amounted to $1,556.82, which were received and retained by the Defendants.

The case has been twice tried. The verdict for the Plaintiff on the former trial was set aside, and a new trial was ordered. The consideration of the case by the Superior Court, as it appeared on that trial, will be found in 4 Bosworth, 1, where the facts, also proved on the second trial, are carefully and fully stated.

On the second trial several questions of fact were very sharply contested, all which were submitted to the jury, under instruction from the Court, and they were found in favor of the Plaintiff. The questions of law now pressed on our consideration will appear from the following examination of the case.

The due delivery of the policy of insurance to the Plaintiff as a valid, binding instrument, is not disputed. It bound the Defendants to make good to him all damages he might sustain on cargoes on account of himself or others shipped, as this cargo was, in his boats, with the express permission of transshipment to the lake boat Hudson, the injury to which caused the loss complained of. The Plaintiff was a common carrier, and received the grain for transportation. As such he was bound to make safe delivery at the place of destination, unless excused by the act of God or the public enemy. His obligation to the owner of the cargo, as well as his interest therein for advances and freight, vested in him an insurable interest to the extent of the fair value of the property covered by the contract of indemnity (12 Barb. 595; 20 N. Y. 177, per Allen, J.; 19 N. Y. 401; 26 N. Y. 126, per Selden, J.; 32 N. Y. 427). These authorities afford a complete answer to the first objection here urged, that the Plain-

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tiff had no insurable interest in the property. It is next urged that the Plaintiff was guilty of negligence in omitting to take immediate steps to ascertain the extent of the loss and damage, and to prevent further injury. Whether guilty of negligence or not, and what damages resulted therefrom, if any, became a question for the jury under the evidence. Much evidence was given bearing on this subject. The learned judge before whom the trial was conducted called the attention of the jury particularly to this branch of the case, and instructed them that it was the duty of the Plaintiff and his agents, having the property in charge when the injury occurred, to do whatever a prudent and careful man would, in such an event and under such circumstances, to preserve it and prevent further loss; and that in determining what could have been done they must look at the facilities at hand for removing the cargo from the boat, and taking other measures for its preservation. He added that, on their determination of this question, would depend the amount for which the Defendants should be held liable in case they should first arrive at the conclusion that the Plaintiff was entitled to recover.

These remarks and instructions presented the case in its true aspect, and were sound in law. The Defendant plainly has no cause of complaint as regards the manner in which this branch of the case was disposed of in the Court below.

The policy gave to the Plaintiff the right to transship the grain from the canal-boats to the lake boat Hudson, and it was so transshipped. It was claimed on the trial that the Plaintiff, at the time he procured the insurance, falsely represented the strength, safety, and the capacity of the Hudson to carry in one parcel the grain shipped in the canal-boats at Buffalo, and that the Defendants were therefore discharged from liability. Evidence was given in regard to the representations alleged to have been made, and also in regard to the size, strength, capacity, and age of the vessel, with a view to establish their truth or falsity. Thus this question became one of fact for the determination of the jury, and the judge charged them that they were to judge how far the evidence in the case supported the Plaintiff's representations; and

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if they should find that it did not, they would then find for the Defendants without further examination of the case. The Defendants clearly had all their rights preserved to them as regards this subject of defence. All they could ask was that the evidence should be laid before the jury, with proper instructions from the Court as to the law. The jury having found against the Defendants, after a full consideration of the evidence, it must be assumed that the proof was insufficient to sustain the defence.

It appeared on the trial that the Hudson was placed the third boat out on the side of the steam-tug; and it was claimed by the Defendants that her captain insisted on this position against the protest of the officers and crew of the tug, and under the assurance from them that she must take that place at her peril. The evidence was somewhat conflicting as to what did occur when the tow was assigned to, or took her position. The judge, however, properly charged in substance that, if the boat was placed in an unsafe position by the Plaintiff, or his agents having her in charge, against the remonstrance of the officers and crew of the tug, and the loss and damage occurred in consequence, then the Plaintiff could not recover. This was undoubtedly the true view of the case, and was a correct presentation of it to the jury.

An improper and dangerous position of the tow, assumed by its master, could not affect the Defendants' liability, unless it occasioned or contributed to the loss and damage. So it was held in Haley v. Earle (30. N. Y. 208) that although the Plaintiff had been guilty of negligence, yet if his negligence had nothing to do with the occurrence, the Defendant has no right to seek, on that account, to excuse the negligence on his part which caused the injury to the Plaintiff. It follows that the judge was right in refusing to charge that the mere fact (if established) that the master of the tow placed her in an unsafe position, would not entitle the Defendants to a verdict. They were unquestionably bound to go further and show, to the satisfaction of the jury, that such improper or negligent act contributed to the injury complained of.

The judge was also right in holding that the measure of dam-

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ages was to be determined according to the price of the grain at the place of the disaster. By the terms of the policy the loss or damage was to be estimated according to the true and actual value of the property at the time the same should happen.

The contract was one of indemnity to the extent of the value of the grain, and evidently contemplated a shifting market and price which would become fixed on the occasion of disaster. This rule of liability fairly meets and answers all the exigencies of the case, and accords with the intentions and purposes of the parties. I think it evident that the contract contemplated an allowance for damages, to be estimated according to the value of the property at the time and place of injury.

Several exceptions were taken to admission and rejection of evidence, but none of them at all affect the merits of the controversy.

The objections to a recovery urged on this appeal have all been above considered, and we are of the opinion that no error exists in the case demanding a reversal of the judgment at the instance of the Defendants. The Plaintiff might well complain of the deduction directed to be made for the net proceeds received by the Defendants on the sale of the grain, taken by them from the sunken boat. It seems that the cargo was, immediately on the happening of the injury, taken in charge by the company and sold on Defendants' account; and the net proceeds of the sale, $1,556.82, were retained by them. This course of procedure entitled the Plaintiff to recover for a total loss. By taking possession of the property, and disposing of it, and retaining the avails, the Defendants made the loss total to the Plaintiff, and were estopped from denying that the loss was otherwise than as they had assumed it to be and made it.

But this was an error favorable to the Defendants; and the Plaintiff having omitted to appeal, must be deemed to have accepted the judgment so rendered.

The judgment should be affirmed, with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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RICHARD RATCLIFFE, RESPONDENT, v. HORATIO N. GRAY, APPELLANT.

Real Estate—Location of Boundary—Evidence.

Actual and continued possession of the premises adjoining the located line is not essential to the existence of *practical location.* It does not depend upon a *pedis possessio* of the land adjoining; but its existence may be established by any competent evidence of the fact.

The surveying out, and fixing upon a line between adjoining properties by the parties themselves, is such a practical location as will control courses and distances; especially when, from the description in the deed or from the decay of boundaries, the line would otherwise become uncertain. But such practical location must have been acquiesced in for twenty years.

As evidence of acquiescence, it is competent to inquire of a witness whose relations to all parties have been such, that had there ever been any dispute about the correct location of such line he would most likely have heard of it, "Did you ever hear of there being more than one west line," &c., describing the marked line in controversy.

PARKER, J.—This is an action of trespass upon land arising out of a dispute between the parties in reference to the location of the division line between them. Both parties derive title from James Cary, who conveyed simultaneously, and on or about March 11, 1807, to Samuel Cary, together with other lands, the fifty acre piece, now owned by the Plaintiff, and to Bela Cary the 131 acre piece, now owned by the Defendant. These two pieces adjoin each other, the fifty acre piece lying east of the 131 acre piece, and it is the line between them that is in dispute. The place of beginning described in the deed of the fifty acre piece is a stake and stones standing in a hemlock stump, "east thirty-nine and a half degrees south from the centre of the highway." The description then proceeds, "from thence north 36 degrees 45 minutes east, 64 rods; from thence north 34 degrees east, 133 rods to a stake and stones; from thence at right angles, 32 rods westerly; from thence south 40 degrees west, 189 rods to a stake and stones; from thence at right angles 51 rods 15 perches to the place of beginning, containing fifty acres of land.—N. B. It is hereby understood that the line running northerly from the stake and stones in said hemlock stump, at the distance of 64

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rods, shall be 40 rods to the east line of said great lot No. 4 in said Sadaquada patent, at right angles with aforementioned line from said stump."

It will be seen that the north line of the fifty acres is, by the deed, only 32 rods in length, and that running this line from the east westwardly, the deed gives no monument for its termination, the course and distance only being given. The Defendant, therefore, claims that the north-west corner of the fifty acre piece is fixed by the termination of the line 32 rods in length; and consequently that the Plaintiff's west line is a line drawn from that point to the south-west corner, respecting which there is no essential disagreement; while the Plaintiff claims for his west line a line commencing at a point on the north, 3 rods and 11 links farther west than the termination of the thirty-two rods, and running thence to the south-west corner. The triangular strip thus formed is the land in controversy, within the northern half of which is the locus in quo.

The ground of the Plaintiff's claim to go beyond the thirty-two rods is that, upon the line to which he claims, there is a well-defined line of marked trees, which, he insists, was made upon a survey of the lots at the time of the conveyances, and at which the parties to the two conveyances located the respective lots upon that line as the boundary line between them; and that such location has been acquiesced in by them and the subsequent owners, from the time it was made up to the commencement of this suit, being a period of more than fifty years.

The trespass complained of consists of the cutting, by Defendant, of wood and timber upon this disputed territory, the drawing away of wood cut there by the Plaintiff, and the marking of a line upon the trees along where the Defendant claims the true line to be.

The action was tried at the Circuit by the Court and a jury, and the Plaintiff had a verdict upon which judgment was entered; which judgment was affirmed by the General Term.

Upon the trial, the Defendant moved for a nonsuit, on the ground that the Plaintiff had not shown a proper title to the

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premises, that he could not claim to hold by a practical location of and acquiescence in the line claimed by him, but should be confined to and controlled by his deed.

The motion was denied, and the Defendant excepted; and this raises the principal question in the case.

The evidence showed, or tended to show, that the land along the northerly half of the disputed line has never been claimed by the Plaintiff. Through the uncleared portion of it is a distinctly marked surveyor's line, shown, by blazing a portion of the marked trees upon the line, to have been made at or about the time when the above-mentioned deeds were given, and that the pieces conveyed to Samuel and Bela Cary, respectively, were surveyed out to them at the time of the conveyance; that the south part of the fifty acres had been cleared before the making of the deeds, and the west line fenced along the clearing, and that this fence was in line with the marked trees, and formed with them a continuous straight line; that it has ever since been mentioned as a line fence by the adjoining proprietors, and that the Plaintiff and those under whom he claims have ever claimed to own up to this line; that the Plaintiff's grantors had, for a number of years after the giving of the deeds, made sugar along and up to the line, and had cut out the timber and underbrush, except the maple trees, along the line for that purpose; and had applied to and obtained the consent of Bela Cary to tap trees on the west side of this line; that Defendant's tenants, when Plaintiff took possession of the fifty acre lot, showed him the line of marked trees as the west line of the lot.

It also appeared that the hemlock stump, described in the deed of the fifty acres as the starting-point, was gone, and the respective surveyors disagreed in their location of it, and that from the description in the deed, wherever the starting-point might be, the premises could not be plotted; the northness and southness failing to balance by 38 links, and the eastness and westness by one chain and four links. By whichever line the fifty acres is bounded, it overruns in quantity, and so with the 131 acre piece.

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Were there in these facts the elements of a practical location, and such acquiescence in it as to bind the parties?

It was held in Baldwin v. Brown (16 N. Y. R. 359) that practical location and long acquiescence in a boundary line are conclusive, not upon the notion that they are evidence of a parol agreement establishing the line, but because they are of themselves proofs that the location is correct; that the "rule seems to have been adopted as a rule of repose, with a view to the quieting of titles, and rests upon the same reason as the statute prohibiting the disturbance of an adverse possession which has continued for twenty years."

Actual and continued possession of the premises adjoining the located line is not essential to the existence of practical location. It does not depend upon a pedis possessio of the land adjoining, but its existence may be established by any competent evidence of the fact. When adjacent owners unite in surveying their respective lots and in making a line upon ground between them, such survey would doubtless constitute and be evidence of a practical location; and the line thus fixed, after a sufficient length of acquiescence, would, it seems, control the courses and distances in the deeds. But particularly would this be so when the grant is, from its terms, or where it becomes, from destruction of monuments, uncertain and ambiguous as to location (Jackson v. Ogden, 4 John. R. 140; S. C. 7 John. R. 238; Jackson v. Freer, 17 John. R. 29; Jackson v. Smith, 9 John. R. 100; McCormick v. Barnum, 10 Wend. 105; Jackson v. McConnell, 12 Wend. 421; Adams v. Rockwell, 16 Wend. 285; Reed v. Farr, 35 N. Y. R. 113; Clark v. Wethey, 19 Wend. 320).

In Adams v. Rockwell (supra) the Chancellor says: "Where there can be no real doubt as to how the premises should be located, according to certain and known boundaries, described in the deed, to establish a practical location different therefrom, which shall deprive the party claiming under the deed of his legal rights, there must be a location which has been acquiesced in for a sufficient length of time to bar a right of entry, under the Statute of Limitations in relation to real estate." And in Clark v.

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Wethey (supra), Judge Cowen, after arguing against the location which allows a practical location to control the courses and distances in the deed, says: "I speak not now of those cases in which time has obliterated the monuments or boundaries of the deed, so as to leave its location a matter of uncertainty; I speak not of cases in which the carelessness or fraud of parties, or any other causes, may have rendered it impossible to locate the deed by known monuments or mathematical lines; where this is so, the declarations of the parties, or their acts of acquiescence or forbearance, were always receivable."

Now, in the case at bar, the description in the deed, both from time and from the destruction of the monuments given as the starting-point, renders the precise location of the land intended to be conveyed uncertain. Then the existence of this line of marked trees, which the jury might believe, from the evidence before them, to have been made by the parties to the first two deeds as the division line between the lots, and the acquiescence which, as there was evidence tending to show, had existed in that line as the boundary of the lots respectively for more than fifty years, were sufficient to entitle the Plaintiff to the judgment of the jury upon the question whether such practical location and acquiescence existed; and, consequently, the motion for a nonsuit was properly denied.

The Defendant's counsel requested the Court to charge the jury in the following words: "When there are no monuments given in the deed, but courses and distances only, it must be controlled by the course and distance on that line." The judge refused to charge in that form, and the Defendant excepted. But upon that point the judge did charge in the precise words of the request, with this addition: "This is so if the line is run by the deed alone; but this proposition fails in its application to a case where the land cannot be plotted from the deed." It is impossible, I think, to hold that there was any error. The effect of the unqualified instruction called for by the Defendant would have been to hold the Plaintiff absolutely to the thirty-two rods for the length of his north line, when, as we have seen, the facts in the case might, as the jury should find them, modify the length of

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that line with reference to the line of marked trees. This request was in effect similar to the one to nonsuit the Plaintiff, and was properly refused.

The objections to the reception of evidence upon the trial were, I think, all properly overruled.

The witness Kent, who lived with Samuel Cary when the deeds to him and Bela Cary were given by James Cary in 1807, and for some years afterward, after speaking of the running out of the lots to Samuel and Bela, of the fence on the south end of the fifty acres, and on the west side of the south part thereof, and that those fences were occupied as line fences, and kept in repair as such, was asked if he ever heard of more than one line on the west side. This was received under Defendant's objection; and the witness answered: "I never heard of but one line till this last summer." His position being such that if there had been any difference between the adjoining proprietors in respect to this line he would have been likely to know it, the fact that he had heard of none, was *some* evidence, however slight, that none was spoken of or existed, and hence some evidence of acquiescence in that line.

The Plaintiff's surveyor was asked by Plaintiff's counsel, "Have you made a calculation as to how long the north line must be, assuming the east, south, and west lines to be as given in the deeds?" "Defendant's counsel objected to the question on the ground that it was speculative and immaterial." The objection was overruled, and Defendant excepted; and the witness answered as follows: "Computing the latitudes and departures as given in the deeds, there is an error in it. The land cannot be run by the description in the deed, because, in following the courses and distances given in the deed, you will not come out at the place of beginning; assuming all other lines to be correct, the north line should be thirty-four rods and twenty links in length."

I am inclined to think the answer admissible, as tending to show the uncertainty and ambiguity of the terms of the deed in respect to location, and, in connection with the other evidence

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in the case, to assist in accounting for the existence and position of the marked line in question.

The same witness was next asked: "How do the lines of this lot and Cary's hold out; do they overrun or fall short?" This was objected to by Defendant's counsel, and received subject to the objection. The witness went on to state substantially that in measuring the lines given in the two deeds the actual measurement of every line, where monuments were given as well as others, overruns the length given in the deed, and stated with reference to each line how much.

The deeds were given at the same time, and there is evidence in the case to the effect that the lots were surveyed out to the grantees at the same time. The fact that every line, as given in the deeds, was shorter than an actual survey now made shows it to be, tends to show that the measurement then made was with a longer chain or measuring-line than the one used in the recent surveys, and that the thirty-two rods then measured ran beyond the termination of that distance now reached, and hence tended to account for a contemporaneous line of marked trees being found further west than thirty-two rods as now measured from the east line of the fifty acres, and to strengthen the evidence of the fact of a practical location of the lots.

I do not see any error calling for a reversal of the judgment, and am of the opinion that it should be affirmed.

Affirmed.

Not voting, HUNT and GROVER, JJ.

JOEL TIFFANY,
State Reporter.

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G. A. OSGOOD AND CYRUS CURTISS, RECEIVERS OF THE COLUMBIAN INSURANCE COMPANY, RESPONDENTS, v. WILLIAM LAYTIN ET AL., IMPLEADED, APPELLANTS.

Company, insolvent, divides its Capital—Recovery from Stockholders.

Where an insurance company, organized under the general law applicable to such companies, being insolvent, distributes its capital among its stockholders, thus placing it beyond the reach of its creditors, it acts in fraud of its creditors, and such fund may be recovered back from those who received it, by a proper action commenced by the proper parties. The complaint in such case need not aver that in making such distribution it was done with an intent to defraud the creditors.

But no one creditor can individually maintain an action against an individual stockholder for the share so illegally distributed to him; the liability is to the creditors generally, and the action should be commenced by some party representing all the creditors.

GROVER, J. — The Columbian Insurance Company was organized as an insurance company by virtue of the general act authorizing the organization of such companies. The company was dissolved by the judgment of the Supreme Court, in February, 1866, and the Plaintiffs appointed receivers, who duly qualified, and gave the requisite security. In July, 1866, the company being insolvent, paid a dividend of three and one-half per cent. upon its stock to the Defendants, who were stockholders of the company. Some of the Defendants, who were creditors of the company, commenced actions individually against several of the stockholders separately, for the purpose of recovering from them the amount of the dividend received by them respectively. Whereupon the Plaintiffs commenced this action against all the stockholders of the company who had received dividends, and also against the creditors of the company who had commenced actions against the stockholders, demanding judgment against the stockholders severally for the amount of the dividends respectively received, and a judgment against the creditors, perpetually restraining them against the prosecution of suits against the stockholders of the company for the collection of the dividends

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received. The Defendants, or a portion of them, demurred to the complaint; the stockholders, upon the ground that the facts stated constituted no cause of action; the creditors, upon the same ground, and also that Plaintiffs had not legal capacity to sue; that there was a defect of parties Defendant, and that several causes of action were improperly united. Judgment was given for the Plaintiffs upon the demurrers at Special Term, which was affirmed on appeal at the General Term of the Supreme Court, from which the Defendants appealed to this Court.

D. D. Field for Respondents.
E. T. Gerry and
C. C. Langdell for Appellants.

GROVER, J.—The point presented by the stockholders who have demurred is, that the Plaintiffs cannot recover from them the sums received as dividends, for the reason that the complaint shows that the same was paid out of capital, and not out of profits, and is not therefore a dividend within the meaning of the law, but a misappropriation of capital, and does not therefore come within the meaning of the statute. I am at a loss to discover how the argument that money paid by the company to its stockholders, although paid as a dividend, is not such, in a legal sense, if sound, can at all benefit these Defendants. Sec. 1, page 506, Laws of 1858, among other things, provides that the receiver of an insolvent corporation may, for the benefit of creditors, treat as void, and resist all acts done, transfers and agreements made in fraud of the rights of any creditor. From the facts stated in the complaint it is manifest that a distribution of the capital of the company, or any part of it, among the stockholders, was a fraud upon the creditors. It is alleged that the company was at the time insolvent.

It must be presumed that the directors, at the time of declaring the dividend, were cognizant of this fact, as it was the duty of each to examine into the affairs of the company before making a dividend, and, when making it, to know that it was made from net profits belonging to the company.

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If the company, being insolvent, distributes its capital among stockholders, thus placing it beyond the reach of its creditors, such act is a fraud upon the creditors, and falls directly within the provision of the statute above cited. It is insisted by the counsel for the stockholders, that to authorize the Plaintiffs to recover, by virtue of the above statute, from the stockholders, the complaint should aver an intent in making the distribution to defraud the creditors.

I do not think this necessary. Ignorance of facts that it was the duty of the managers to know, not to know which was gross negligence, cannot excuse the managers, and impart any virtue or validity to acts otherwise clearly illegal, and which were a palpable fraud upon the creditors. But I do not think the position sound. Sec. 20 of the act to provide for the incorporation of insurance companies, as amended in 1857 (4 Edm. R. S. page 210), provides that "no dividend shall ever be made by any company incorporated under this act, when its capital stock is impaired, or when the making of such dividend will have the effect of impairing its capital stock; and any dividend so made shall subject each of the stockholders receiving the same to an individual liability to the creditors of said company, to the extent of such dividend received by him." This shows that the Legislature used the term dividend in its popular sense—that is, a sum of money distributed pro rata among the stockholders, without reference to the source from which it was taken or paid.

The fact of its being illegal to make a dividend of anything but net profits does not at all tend to show the meaning of the Legislature in the use of the word. The design plainly expressed by the language of the section was to prohibit a dividend of the capital among the stockholders, and to preserve the same intact as a fund for the payment of creditors and security of dealers. It follows that the dividend in the present case was illegal, and that the stockholders receiving the same are liable to the creditors for the amount by them respectively received. The next question is, how is this to be recovered from the stockholders? Their liability is to the creditors of the company.

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It is clear that no one creditor of the company can maintain an action against an individual stockholder, for the reason that the liability created by statute is to the creditors generally, and not to individual creditors, thus creating a liability to the creditors jointly. Again, a creditor, if permitted individually to sue the separate stockholders, might institute actions against each, although his demand amounted to far less than the aggregate liability, and he would continue a creditor until he had obtained satisfaction of his debt, and could obtain judgment in all the actions. Again, in equity this liability inures to the creditors in proportion to the amount of their debts respectively.

The maxim "that equality among creditors is equity," is applicable to the case. A court of law cannot, in a joint action by all the creditors, work out this equity and do justice between the parties.

This confers jurisdiction in equity, upon the ground that there is no adequate remedy at law.

The Plaintiffs, as receivers, are trustees for all the creditors, and the appropriate parties to prosecute in their behalf, thus avoiding the troublesome inquiry as to who are creditors in the proceeding, to collect from the stockholders the several amounts each is liable to pay. All the stockholders who are liable may, and should, be included as Defendants in the same action. There is no difficulty in determining the amount each is to pay, upon the trial of the cause; and, in case the whole amount of the liability is not required for the payment of the debts of the company, the precise amount each is to pay can be determined in the action.

This course of proceeding is also necessary to prevent multiplicity of actions, as there are several hundreds of stockholders.

The above views dispose of the case as to the stockholders. The creditors insist that they are not proper parties to the action against the stockholders, and that upon this ground they are entitled to judgment upon the demurrer.

Equity having the power to enforce payment from the stockholders, and an action having been instituted in the proper mode for that purpose, which in its result will place the fund in the possession of the Court for distribution among the creditors, it is the

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duty of the Court to protect the stockholders from being harassed by other actions instituted to enforce the same liability.

This can only be done by restraining such actions. To enable the Court effectually to do this, those creditors who have instituted such suits, and those who threaten so to do, are proper parties to the action.

The judgment appealed from should be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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LABEN JACOBS, RESPONDENT, v. GEORGE REMSEN, SHERIFF, &c., APPELLANT.

Assignment, preferential—Possession unchanged—Presumptive of Fraud.

In this State preferential assignments are not for that reason void, and an assignment authorizing the assignee to employ and pay all necessary attorneys' and clerks' fees, etc., and to take and have a reasonable compensation for his services; also, to pay and discharge all reasonable costs, etc., is not thereby rendered void, because it authorizes no more than was before lawful for the assignee to do.

The fact that there is no change of possession of the assigned property, in case of assignment for benefit of creditors, is not conclusive of fraud, but only presumptive thereof.

H. C. Van Voorst for Appellant.
M. I. Townsend for Respondent.

DAVIES, CH.J.—This Plaintiff seeks to recover the value of certain goods, &c., which he claims as owner, and were taken and converted by the Defendant. The complaint alleges that one Frederick Wiechel, on the 14th day of November, 1859, by an instrument in writing, assigned to the Plaintiff a certain stock of goods theretofore owned by said Wiechel and in his possession; that thereupon the Plaintiff took and received the possession thereof, and continued in the possession of the same until the 9th day of December, 1859, when the said Defendant wrongfully deprived him of possession thereof, and took and converted the same.

The Defendant justified the taking by virtue of an attachment issued in favor of one Frederick A. Dreyer against the said Wiechel, on the said 9th day of December, 1859, in which action a judgment was subsequently obtained, and an execution issued thereon, by virtue of which he had levied upon said property, and held the same by virtue of the said attachment and execution, as he lawfully might.

The Plaintiff claimed to hold the said goods and property by virtue of the said assignment, and the Defendant claimed and in-

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sisted that he had no title thereto by virtue thereof, upon two grounds.

First. That said assignment was fraudulent upon its face, and therefore void.

Second. That it was fraudulent in fact, as being made with the intent to hinder, delay, and defraud creditors.

The jury found a verdict for the Plaintiff, and judgment thereon was affirmed at the General Term.

It is here insisted, on behalf of the Appellant, that the assignment was fraudulent on its face, and therefore void.

The grounds of this argument are:

First. That the assignment contains preferences. It is needless to cite authorities to show that, by the law of this State, preferential assignments are not, for that reason, fraudulent and void.

Second. It is urged that as, by the assignment, the assignee was authorized to employ and pay for all necessary attorneys, clerks, and agents, and should be entitled to and was thereby authorized to take and have a reasonable compensation for his services, and was authorized to pay and discharge all the just and reasonable costs and expenses attending the due execution of the assignment, and the conveying with effect the trust thereby created, together with a reasonable and lawful compensation for his own services, that these provisions render the assignment void. It was aptly observed in the opinion of the Supreme Court in this case: "These provisions give to the trustee large and extensive powers, and which may be liable to abuse; but as we cannot say they grant any other or further power and authority than the law would imply as necessary to carry the trust into execution, their presence in the instrument does not render it fraudulent per se."

The cases in this Court fully sustain these views (Campbell v. Woodworth, 24. N. Y. 304; Townsend v. Stearns, 32. N. Y. 209; Benedict v. Huntington, ib. 219). This assignment, therefore, is not void for anything appearing upon its face.

The jury have found by their verdict that it was not fraud-

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ulent in fact. This was a question exclusively for them to decide; and when the question is whether an assignment, made by an insolvent debtor in trust for the benefit of his creditors, is fraudulent *in fact*, the finding of a referee, or of a jury, upon conflicting evidence, that it is not fraudulent, cannot be legally disturbed by the Supreme Court (Ball *v.* Loomis, 29. N. Y. 412).

It is urged by the Appellant's counsel that the assignee continued in the possession of the assigned property after the execution of the assignment, and that this circumstance is conclusive evidence of fraud in its execution.

The counsel puts this stronger than the cases will warrant.

This Court held, in the case of Ball *v.* Loomis (supra), that it is not an irreversible and unqualified rule of law that there must be an actual and continued change of possession, in order to shield an assignment of property in trust for the benefit of creditors from the imputation of fraud.

The fact of there being no change of possession is presumptive evidence of fraud, and conclusive, unless rebutted by affirmative evidence of good faith, and the absence of an intent to defraud.

If there were no errors committed on the trial, it follows that the verdict and judgment thereon for the Plaintiff are correct, and should be affirmed.

It is now insisted that the judge erred in excluding this question, put to one of the Defendant's witnesses: "What did Wiechel say, when you called to levy under the attachment, in answer to what you said?"

This was on the 9th of December, 1859, and nearly a month after the execution of the assignment by Wiechel to Jacobs, and after the latter had taken actual possession of the assigned property.

This was objected to by the Plaintiff's counsel, unless Jacobs was present. Objection sustained, unless Defendant will admit that Jacobs was there, and the Defendant's counsel excepted.

This ruling was clearly correct. Any admissions or statements of what Wiechel said at this time, and under these circumstances, could not be evidence against the Plaintiff.

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There is an exception to the Judge's charge which remains to be noticed. He said to the jury: "That the law gives the debtor a right to make preferences, if done in good faith; and it was for the jury to determine whether any portions of the preferred claims in the assignment were fictitious, and if they were the assignment would be fraudulent and void; that in respect to the judgment of Eager & Co. against Wiechel, which Jacobs claimed to have purchased, if the jury found that before the assignment Jacobs agreed with Mr. Campbell, who had control of the judgment, to pay him the amount of $90 due on the judgment, and the sheriff's fees upon the execution, upon condition that he, Campbell, would release the levy which he then had upon Wiechel's goods, and have the judgment assigned to Jacobs, and if such levy was released upon that arrangement, then the amount due on the judgment would be a valid debt in favor of Jacobs, whether Campbell delivered to him an assignment at the time or subsequently, or whether Jacobs paid Campbell the amount then or afterward; and if the amount due on the judgment, under such circumstances, constitutes a portion of the $500 for which Jacobs was preferred, it would not, for that reason, be fictitious."

To which part of the charge the Defendant's counsel excepted. As the exception is to the whole of this portion of the charge, if any part of it is correct, the exception fails.

There can be no question of the soundness of that portion which states that the law gives the debtor the right to make preferences, if done in good faith, nor to the succeeding sentence, that it was for the jury to determine whether any portions of the preferred claims in the assignment were fictitious, and if they were, the assignment would be fraudulent and void.

These portions of the charge being undeniably sound, the exception must fail.

But it must not be inferred from this that any doubt is entertained of the correctness of the residue of the charge.

It appeared upon the face of the assignment that the assignee was authorized to retain out of the assigned estate, and for himself, the sum of $500, being, as was said, the amount of money

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heretofore loaned by the party of the second part to the said party of the first part.

This debt was attached by the Defendant as fictitious, and it was sought from this fact to set aside the assignment. It appeared upon the trial that the amount of money actually loaned by the Plaintiff to Wiechel, previous to the assignment, was $410, and the Plaintiff testified, on the Defendant's examination, that "he (Wiechel) owed me in addition $90.

"That was a judgment or levy on his goods. I held the assignment of a judgment now produced. I purchased the judgment of Mr. Campbell. I told him I would buy it if he would wait for his pay. I had this assignment on the 14th of November, and paid for it afterward." The witness testified that he had paid the full amount, $90.

Upon these facts it is not perceived that the charge of the learned Judge at the Circuit was not as favorable to the Defendant as he had any right to expect. Clearly, the Plaintiff, Jacobs, had a valid claim for the amount of this judgment against Wiechel, the judgment debtor. It was a lien on the assigned goods at the time of the assignment, and Jacobs, by assuming it, increased the indebtedness of Wiechel to him by its amount, making his total demand against him (Wiechel) the sum of $500, named and preferred in the assignment. The other exceptions are not of sufficient moment to need any further remark. They are in substance disposed of by what has been already said.

The judgment appealed from should be affirmed, with costs.

Affirmed.

JOEL TIFFANY,
State Reporter.

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DANIEL S. WRIGHT v. THOMAS PAIGE.

Slander—Words must impute Indictable Crime—Evidence, Credibility.

Words, to be actionable per se, must be such as to impute a crime for which the party would be indictable.

A bawdy-house is a common nuisance, and the person keeping it may be indicted therefor; and to charge a person with keeping a whore-house is actionable per se, as it imputes the misdemeanor of keeping a bawdy-house. Slanderous words are to be construed according to their common acceptation, and not according to the particular understanding of those who hear them uttered.

To impeach the general credibility of a witness, it is not necessary that any one should swear directly that they would not believe the witness under oath.

BOCKES, J.—Appeal from a judgment. The action is for slander. The words charged, among other opprobrious epithets, were that the Plaintiff kept a whore-house. No special damage is alleged, nor does it appear that any was proved, or attempted to be proved. The Plaintiff proved the uttering of the words by the Defendant, and had a verdict in his favor.

It is urged that the words are not actionable per se. In Martin v. Stillwell (13 John. 275), the words were, "Mrs. Martin kept a bawdy-house." Held actionable. This case is referred to and approved in Young v. Miller (3 Hill, 21), where Judge Bronson remarks that such a house is a common nuisance, and the person keeping it may be punished by indictment; and after citing some other cases, he adds: "In all these cases the Court went upon the ground that the words imputed 'a crime involving moral turpitude,' and for which the offender may be proceeded against by indictment."

Words, to be actionable per se, must impute a crime involving moral turpitude, punishable by indictment. It is not enough that they impute immorality—moral dereliction, merely—but the offence charged must be also indictable. At one time it was supposed that the charge should be such as, if true, would subject the party charged to an infamous punishment; and it was so

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urged in Widrig v. Oyer (13 John. 124). But the Court declined so to hold. And in Martin v. Stillwell (supra), it was laid down that if the words imputed moral turpitude, and charged an indictable offence, they were actionable, although the offence charged could not be punished by an infamous punishment. So in Alexander v. Alexander (9 Wend. 141), it was held sufficient if the words charged would, if true, subject the party to criminal punishment of any description. The case is cited, and the rule was approved and adopted in Young v. Miller.

The offence charged in Young v. Miller was but a misdemeanor, not a felony; but the words imputed a crime involving moral turpitude, and for which the offender might be proceeded against by indictment. The words were held actionable. In Bush v. Prosser (13 Barb. 221), a recovery was allowed in slander for charging the Plaintiff with keeping a bawdy-house, or house of ill-fame.

In this case the words charged are, that the Plaintiff kept a whore-house; and the complaint contains an innuendo alleging that the Defendant, by such charge, falsely and maliciously imputed to the Plaintiff the crime and offence of keeping a bawdy-house. The Court was requested to charge, and did charge, the jury, that in order to sustain the action they must find that the Defendant intended, by the words counted on and proved, to charge the Plaintiff with what was equivalent to keeping a bawdy-house for public prostitution. This certainly was going quite as far as the Defendant had any right to ask. The charge of keeping a whore-house is synonymous with a charge of keeping a bawdy-house or house of ill-fame.

The words are to be taken in their natural meaning, and according to common acceptation; in other words, according to their plain and natural import (Carroll v. White, 33 Barb. 615, and cases there cited). By common acceptation, to keep a whore-house is to keep a bawdy-house, or house of ill-fame. Indeed, to charge the former is equally opprobrious and more directly and unquestionably significant, if possible, than to charge the latter. It is a coarser expression, conveying the same idea. It is most

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clearly a charge of keeping a house for common prostitution; which is the precise definition of a bawdy-house. It is needless to say that such charge imputes a crime involving moral turpitude. This crime is also an indictable offence.

A bawdy-house is a common nuisance, and the person keeping it may be punishable by indictment (The People v. Jackson, 3 Denio, 101; The People v. Erwin, 4 id. 129; Young v. Miller, 3 Hill, 21). By the statute the offence is punishable with imprisonment at hard labor, and on bread and water (1 R. S. 638, §§ 1, 2, 10). It is therefore clear, on principle and authority, that the words charged in the complaint, and for which a recovery was allowed, were actionable. The objection that the complaint did not contain a cause of action, and the exception to the refusal of the Judge to charge the jury that the Plaintiff had not charged or proved a cause of action, were not, nor was either, well taken.

The Defendant requested the Court to charge the jury, that inasmuch as the witnesses had not sworn that they understood the Defendant to mean by the words spoken that the Plaintiff kept a bawdy-house for public prostitution, the Plaintiff had failed to show actionable words. The Court properly refused so to charge. As has been said, the words were to be construed according to their common acceptation. It was for the witness to state them, and the circumstances under which they were uttered, and their import was for the Court and jury. It is ordinarily not admissible, on the trial of an action of slander, to inquire of the witnesses how they understood the charge (Gilson v. Williams, 4 Wend. 320; Van Vechten v. Hopkins, 5 John. 211). The Court decided correctly in refusing to charge as requested.

It seems that an attempt was made to impeach a witness produced by the Defendant, by whom he sought to prove a justification of the slander. In fact, no justification of the slander whatever was shown by her, and the evidence was entirely immaterial on that issue. But it was not objected to, and, if credible, bears, perhaps, on the Plaintiff's character, and in that way was of some

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importance on the question of damages. I will, therefore, examine the exceptions interposed to the ruling of the Judge on that branch of the case, without deciding, however, that the evidence was admissible, had it been objected to.

On the question of impeachment, evidence was given showing that the general moral character of the witness was bad, and that her general character for honesty and integrity was bad; also that she was reputed to be unchaste, and to possess a disposition to steal; and that she kept a place for the sale of liquors, which was the resort of vile characters. The witnesses were not asked whether they would believe her under oath. No evidence was offered to sustain the witness, nor was any objection taken to the sufficiency or completeness of the impeaching testimony until the summing up by the counsel to the jury, when it was insisted that the impeachment was ineffectual, inasmuch as no one had sworn that he would not believe the witness under oath. The Court charged the jury that they should take into consideration the manner of the witness when testifying; the nature of her evidence, whether or not consistent, and also the evidence of the witness called to impeach her general moral character, and determine whether they would believe her statement; and that it was not necessary, under the circumstances of the case, in order to impeach her, that the witnesses who testified to her general moral character should have been asked whether they would believe her under oath. To the latter clause of this charge the Defendant's counsel excepted, and requested the Court to charge that, inasmuch as it had not been proved that the witness by whom her character was shown to be bad would not believe her under oath, she was not impeached, and that the impeaching testimony in that behalf was of no force. The Court declined so to charge. The learned Judge was manifestly right, both in his charge and refusal.

As to the charge, it was not necessary, under the circumstances of the case, to ask the impeaching witnesses whether they would believe her under oath, if indeed it be necessary under any circumstances, for the purpose of a successful impeachment.

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The attention of the jury was called to the conduct of the witness while under examination; her manner of giving evidence; its probability or consistency, from which we are to infer that these were proper subjects of remark; especially must we so infer, as there was no exception to this part of the charge. If her conduct and manner of testifying were insincere or reckless, and her statements improbable and contradictory, this would be enough to authorize the jury to discredit her. Circumstances attending the examination of a witness may, without countervailing proof, become so overwhelming as utterly to destroy his evidence.

It was not necessary, therefore, to the impeachment of this witness that another should swear that he would not believe her under oath; nor was it any the more necessary for the reason that several witnesses had also sworn that she was of notoriously bad moral character.

As regards the request to charge that the witness was not impeached, because it was not proved that the persons by whom her moral character was shown to be bad would not believe her under oath, it is sufficient to say that she stood impeached, perhaps, by other evidence than that given by these witnesses. At any rate, there was other evidence tending to her impeachment, and hence it would have been improper to charge as requested. As part of the same proposition, the judge was requested also to charge that the impeaching testimony in that behalf had no force. The request must stand or fall as an entirety, and if any part of it was improper, the judge was right in rejecting it. A proposition on which a judge is asked to charge must be good in all its parts, both as to the law and facts, or he may refuse to give the instruction asked for; and he may do so without qualification (Daughty *v.* Hope, 3 Denio, 594; same case on appeal, 1 Comst. 79; Zabriskie *v.* Smith, 13 N. Y. Rep. 322; Cronk *v.* Canfield, 31 Barb. 171; Haggart *v.* Morgan, 5 N. Y. Rep. 422; Magee *v.* Badger, 30 Barb. 246; Jones *v.* Osgood, 6 N. Y. Rep. 233; Van Kirk *v.* Wilds, 1 Barb. 520). In this view, therefore, the learned judge very properly declined to charge as requested.

But suppose the impeachment to rest solely on the evidence of

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those persons by whom the moral character of the witness was proved to be reputedly bad, was the impeaching testimony "of no force" without showing further, by those persons, that they would not believe the witness under oath? On the question of general impeachment, the credibility of a witness is to be determined from general character. After one has so conducted in community that he has earned the reputation of being a person of notoriously bad character, he is open to discredit in a court of justice. This is the common sentiment of mankind. But the point here is as to the kind and extent of proof necessary to the submission of the question to the jury, in case of an attempted general impeachment. The mode of establishing a general impeachment of a witness is by an examination into his character—his moral standing in community. The inquiries should be made of his neighbors, or those acquainted with his reputation and standing. An inquiry, however, is not allowed as to any particular offence, species or class of crimes or immoralities. As was said in Bakeman v. Rose (18 Wend. 146), you cannot inquire whether the witness has the general reputation of being a thief, prostitute, murderer, forger, adulterer, gambler, swindler, or the like; although each and every of such offences, to a greater or less degree, impairs the moral character of the witness, and tends to impeach his or her veracity. But the inquiry must be general in its scope and tendency. What should be the question in such case, both as regards substance and form, has often been matter of grave discussion. In Phillips on Evidence (see text), the rule is stated thus: The regular mode of examining into the general character of a witness is by inquiring of the witnesses who are called to impeach it, whether they have the means of knowing his general character, and whether with such knowledge they would believe him on his oath. In Cowen and Hill's notes we find it said, that in general the proper question is whether the discrediting witness knows the general character of the witness sought to be impeached, in respect to truth, among his neighbors; and what that character is—whether good or bad. Greenleaf lays down the rule thus: The regular mode of examining into gen-

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eral reputation is to inquire of the witness whether he knows the general reputation of the person in question among his neighbors, and what that reputation is. Swift, in his treatise, remarks: The only proper question is whether he knows the general reputation of the witness, in point of truth, among his neighbors, and whether it is good or bad. Starkie says: The only proper question is whether he would believe him under oath. It has been held that the question may be asked, what is the general character of the witness, in the neighborhood where he resides, as a man of truth; and what is his general character for truth and veracity; also, what his general moral character is. On looking into the books, it will be found that the Courts have, first and last, given sanction to questions in each and every of the forms above stated or suggested. Not that either or all of them were the only ones which might be put, but that such questions were proper, both in form and substance, to be asked of the discrediting witnesses. It is well settled, too, by numerous decisions, that in addition to any or all of these questions, the witness may be asked whether he would believe the person, whose credibility is attacked, on oath. Greenleaf, after stating the proper mode of examination to be, to inquire of the witness whether he knows the general reputation of the person in question, among his neighbors, and what that reputation is, says that in the English Courts the course is further to inquire whether, from such knowledge, the witness would believe that person upon his oath. But he adds, "in the American Courts the same course has not been pursued; but its propriety has of late been questioned, and perhaps the weight of authority is now against permitting the witness to testify as to his own opinion." It is admissible, however, in this State, as in England, to superadd to other questions the inquiry whether the witness, from his knowledge of the general character of the person, would believe him under oath. But, as was remarked by the counsel in this case, the great struggle has been to induce the Courts to allow this question to be put. It is now held admissible, but it is not, as I am aware, absolutely essential to a successful impeachment. The decision in Gilbert v. Sheldon (13 Barb. 623)

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does not reach this case, although I think the argument of the learned judge who delivered the opinion of the Court may cover it. There the question put went merely to general character, not to general moral character, and this distinction was marked and commented on by the learned judge. If the decision in that case is to the extent that there cannot be an effectual impeachment of a person without proving by the discrediting witnesses that they would not believe him under oath, I am unwilling to follow it.

If a person is shown to be of notoriously bad moral character, he is certainly a most unreliable witness, and, in my judgment, it then becomes a proper matter for the jury to determine whether they will credit his statement, without the further testimony from the discrediting witnesses that they would not believe him under oath. If they should so state, it would add very little force, if any, to the other evidence. In the case at bar, a female witness is shown to be of bad character—reputed to be dishonest, unchaste, wanting integrity, untruthful, thievish, and a keeper of a resort for vile characters; and the Court is asked to charge the jury that she stands before them, as regards the question of general impeachment, a perfectly fair witness—in the exact language of the request, "that the impeaching testimony in that behalf was of no force;" and for the reason, simply, that the witnesses were not asked whether they would believe her under oath. The proposition is contrary to the dictates of reason and propriety—simply absurd.

After impeaching witnesses are shown to be acquainted with the general moral character of the person whose credit is assailed, and they declare it bad, the question of credit is then, in my judgment, for the jury, under proper comments from the Court, without any inquiry of the discrediting witnesses as to whether they would believe him under oath.

In such cases the jury ought not to be precluded from drawing fair and reasonable inferences from the evidence.

I am satisfied that the record in this case is free from error, and that the judgment should be affirmed.

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Judgment affirmed.

The Court adopt the opinion of Judge Bockes in the Court below, and affirm the judgment.

JOEL TIFFANY,
State Reporter.

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BLAISE LORILLARD, Respondent, v. GEORGE W. M. SILVER, Appellant.

Words—"In case I realize"—Construction.

Where the grantee of land agreed to pay the grantor five hundred dollars additional price, provided he realized thirty-five hundred dollars for said land, and he was offered by responsible parties forty-five hundred dollars, which he refused to take for said land: Held, that said grantee was under no legal obligation to sell such land at any price; and that until he did sell for, or above, the price named, he was not liable to pay the five hundred dollars.

This is an appeal by the Defendant from an order of the General Term, reversing the judgment in his favor, entered upon the report of the referee, and granting a new trial.

The Respondent claims the right to recover of the Appellant the sum of $500, and interest, under the following agreement:

"This is to certify that I agree to pay to Blaise Lorillard, in consideration of a certain piece, parcel, or tract of land, purchased of him as per deed, bearing date this twenty-sixth day of March, one thousand eight hundred and fifty-six, over and above the amount specified in a note given by me to him, bearing the same date, five hundred dollars, in case *I realize* thirty-five hundred dollars for said land, or any other sum between three thousand and thirty-five hundred that I may sell said land for, less the interest on said purchase after six months and to the time I may dispose of the same.

"Geo. W. M. Silver.

"Saugerties, March 26, 1856.

"Witness, Albert Silver."

The referee finds as further facts in the case, that the premises were purchased by the Defendant on speculation, for the purpose of selling again, and not as a permanent investment; that, in the summer of 1856, the sum of $4,500 was offered to the Defendant for the premises, by a responsible man.

His offer was not accepted. Afterward the premises declined in value, and there is no evidence that since that offer the prem-

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ises can be sold for the amount actually paid for them, viz., $2,500.

S. Hand for Appellant.

E. Cooke for Respondent.

HUNT, J.—The disposition of the case will be controlled by the meaning of the expressions in the contract, "in case I realize," and "that I may sell said land for." The referee held that the Defendant was only liable in the event of his actually making a sale of the premises, and receiving payment on such sale.

The General Term, on the contrary, were of the opinion that if the Defendant had an offer for the premises from which he could have made the requisite amount, but which for any reason he did not accept, he thereupon became liable to the Plaintiff for the sum of five hundred dollars. The language employed in the contract appears to be carefully selected with a view of avoiding this latter conclusion.

To "realize" means to bring into actual possession. It is ordinarily read in contrast to hope or anticipation. The Defendant may hope or expect to sell his lot for six thousand dollars, but until he actually sells and receives the money, or its equivalent, he cannot be said to have "realized" either his hopes or his profits. In the present case he had an offer of $4,500, which he did not accept. He may have erred greatly in not accepting this offer. He may have lost the opportunity thereby to secure to himself an advance of a thousand dollars, and to the Plaintiff an advance of five hundred dollars.

It cannot, however, be said that he has "sold the land" and "realized" over three thousand dollars. He still holds the land, and, as all parties admit, has received nothing upon its sale.

If the contract had used language importing an obligation to sell on his part, or to use diligence to effect a sale, or to exercise his judgment when an offer to sell should be made, a different question would in each event have been presented.

The present contract, however, plants the Defendant upon the

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naked ground of "selling the land" and "realizing" a specific amount. This state of things has never yet been reached.

The Plaintiff's counsel claims that the Defendant stood in the position of a trustee for the Plaintiff, to the extent of five hundred dollars, and so far bound to act for his exclusive benefit. No such intention is fairly to be derived from the terms of the contract. The Defendant entered into the purchase as a speculation on his own account, and for his own benefit. The primary object of the purchase was to make money for himself.

The Plaintiff also entered into the speculation to the extent of receiving a portion of the proceeds, when realized, as an addition to the purchase-money. The exclusive right to dispose of the property was left with the Defendant, and it was a necessary result that he was justified in acting with reference to his own interest in accepting or rejecting an offer for the property.

I think it was in the contemplation of the parties that the Defendant was to act upon this principle, and that if it should result, while so acting, that a certain rate of profit should be made, then the Plaintiff's right should attach to the additional five hundred dollars.

His rights were subordinate to and dependent upon the result of the Defendant's disposition of the property.

I think the order of the General Term should be reversed, and the judgment upon the report of the referee be affirmed.

GROVER, J.—No facts authorizing a reformation of the contract were found by the referee. The order of reversal does not show that it was based upon questions of facts. The only question, therefore, to be determined by this Court is, whether the Plaintiff, upon the facts found by the referee, was entitled to recover. This depends upon the true construction of the contract. By that adopted by the Supreme Court, the Defendant was bound to sell the land whenever he could obtain such a price as, by the terms of the contract, would require him to pay the Plaintiff five hundred dollars. This he agreed to do in case he realized thirty-five hundred dollars for the land, over and above in-

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FRANCIS MORRIS, APPELLANT, v. MARGARET A. WARD, RESPONDENT.

Will—Statute of Descents—R. S. Part II. Ch. 2.

The estate comes to the intestate "on the part of the mother," where it was a gift by the grandfather to the mother for life, and remainder to her surviving issue, of which the intestate was one.

In such case, the mother dying, leaving two children her only surviving issue, on the death of one of the issue the estate descends to the father for life, with remainder to the survivor of the children.

PARKER, J.—This action was brought in the Supreme Court, to obtain an adjudication declaring the Plaintiff's estate in certain city lots, in the city of New York, which he holds with the Defendant, to be an estate in fee, instead of an estate for the life of the Defendant's father, Samuel Ward, as claimed by the Defendant.

The Plaintiff, through several conveyances, has obtained the interest which Samuel Ward had in the premises; and what that interest is, whether a moiety *for the life* of Samuel Ward, or *in fee*, is the principal question in the case.

The action was referred, and the referee held that the estate of Samuel Ward was only an undivided moiety in the lands in question for his life, and dismissed the complaint, and directed judgment for the Defendant, against the Plaintiff, for costs.

The material facts established in the case by the findings of the referee, and the admissions in the pleadings, are as follows:

On the 25th day of January, 1838, the said Samuel Ward married Emily Astor, the daughter of William B. Astor, and grand-daughter of John Jacob Astor, late of the city of New York, deceased. On the 16th day of February, 1838, the said John Jacob Astor, by deed of that date, for the consideration therein expressed, of natural love and affection to said Emily, and of one dollar, did give and grant unto her (besides certain bonds and mortgages), thirty-two lots of land, therein and in the complaint described, with the hereditaments

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and appurtenances thereof, to have and to hold the same to the said Emily during her life, unless she or her husband should attempt any sale thereof, or make or allow any incumbrance thereon, in which case her estate was to cease, and the same was given to trustees, to receive the rents and profits thereof, and apply them to her use during her life; and by the same deed, and for the same consideration, the said John Jacob Astor did give and grant the said lands and their appurtenances, from and after the death of the said Emily, unto her surviving issue, and their heirs and assigns forever, and did declare that the provisions therein made were to be deemed an advancement to the said Emily, out of his estate, and to be so accounted under his will, and that the said lands and bonds and mortgages were, for such purpose, valued at $200,000.

This sum of $200,000 the will of the said John Jacob Astor, published December 30, 1846, charged upon the residuary portion of his estate, therein given to the said William B. Astor, as a sum to be settled on the said Emily and her issue, and in regard to which, by a codicil to said will, made and published January 19, 1848, he made the following provision: "I direct that the said portions of $200,000, for each of the daughters of my son William B. Astor, shall be settled on them on their respectively attaining the age of twenty-one years, or their marriage."

On the 18th day of February, 1841, the said Emily died, leaving her surviving her husband, the said Samuel Ward, and two children, the issue of said marriage, viz., Margaret Astor Ward, the Defendant, and William Samuel Ward, now deceased. On the 23d day of February, 1841, the said William Samuel Ward died intestate, leaving no descendant, but leaving him surviving his father, the said Samuel Ward, and his sister, the said Defendant, and no other heir-at-law.

The said Samuel Ward, and Margaret A. Ward, the Defendant, as proprietors of the parcel of land, consisting of thirty-two lots, described and conveyed by the said deed of settlement, had the right of pre-emption to take out a grant from the Mayor, Aldermen, and Commonalty of the city of New York, of the land under

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been imposed upon said sixty-four lots by the Corporation of the city of New York, belonging to the owner of the estate, which the said Samuel Ward had therein to pay, and which had been wholly paid by this Defendant; in which action judgment was obtained, whereby it was adjudged that an "estate in the undivided half of said lots, for the natural life of the said Samuel Ward, formerly belonged to Samuel Ward, and now belongs to the said Mary Griffin, as executrix, &c., of Francis Griffin, deceased, ... and that the Plaintiff (Margaret A. Ward) has an estate in fee-simple in the said lands, subject to the said life estate;" and by which judgment it was further adjudged that the "estate or interest which formerly belonged to the said Samuel Ward, and which now belongs to the said Mary Griffin, as executrix as aforesaid . . . . . is indebted and liable to the Plaintiff" in several sums therein specified, which are declared to be a lien upon said estate, or interest, and upon default of payment of said several sums by said Samuel Ward and Mary Griffin, executrix as aforesaid, within twenty days, it was further adjudged that the said estate, right, title, and interest of the said Samuel Ward, and the said Mary Griffin, as executrix as aforesaid, and of each of them, of, in, and to, and out of said parcel of land, be sold by a referee therein named, who should execute to the purchaser a good and sufficient deed therefor, which should vest in said purchaser a good and valid title in the equal undivided half-part of said lots, for and during the natural life of said Samuel Ward; that default being made in the payment of said sums of money, the said referee, in pursuance of said judgment, sold and conveyed the said estate of Mary Griffin, as executrix as aforesaid, and Samuel Ward therein, to Joseph W. Revere, and that Revere, on the 28th of July, 1853, conveyed to the Plaintiff. That the Plaintiff, in March, 1854, by action against the Defendant, in which he claimed to be the owner of an undivided moiety of the premises for the life of said Samuel Ward, and alleged that the Defendant was the owner of an estate in fee of the said premises, subject to the said estate of the Plaintiff therein, obtained a partition of said premises in accordance with such claim and allegation.

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Also that, afterward, on the 19th of June, 1855, the Plaintiff obtained a conveyance from Mary Griffin of all her estate, right, title, and interest in and to the said premises.

In regard to the thirty-two lots described and conveyed in the deed of 16th of February, 1838, the Plaintiff claims and insists, that under the statute of descents, Samuel Ward inherited from his son, William Samuel Ward, deceased, the estate which came to said son on the death of his mother, which was an estate in fee in an undivided moiety of said lots, the same estate in the other undivided moiety being in the Defendant.

And that the said Samuel Ward, and the Defendant, having equal interests in said lots, were entitled to receive, by virtue of such equal interests, from the Mayor, &c., of the city of New York, the same interests respectively, in the lands under water conveyed to them, as they had in the original lots, and that the Defendant must be deemed to hold the remainder in the undivided half conveyed to said Samuel for his life, in trust for him and his assigns.

As to the thirty-two original lots, the quantity of Samuel Ward's estate therein depends upon the construction of the deed of settlement under the statute of descents (1 R. S., Part 2, chap. 2).

His son, William Samuel Ward, on the death of his mother, took, as is conceded, an estate in fee in one undivided moiety of those lots. On his death, his father inherited the whole of the estate of his intestate son therein, "unless the inheritance went to the father for life, and the reversion to the Defendant."

The inquiry then is, whether the inheritance came to the intestate on the part of his mother; for I regard the expression in § 5 of this statute, "the inheritance descending on her part," as referring to the same contingency as the expression in the same section, "unless the inheritance came to the intestate on the part of his mother." The construction of the section shows that such must have been the idea. The language is as follows: "In case an intestate shall die without lawful descendants, and leaving a father, then the inheritance shall go to such father, unless the inheritance came to the intestate on the part of the mother, and

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such mother be living; but if such mother be dead, the inheritance descending on her part shall go to the father for life, and the remainder to the brothers and sisters of the intestate," &c.

The contrast or opposition expressed by "but," is to the case stated in the previous clause of the sentence; that is, although the provision contained in the first clause, that the inheritance shall go to the father, is not to apply when the inheritance came to the intestate on the part of his mother, and she is living, yet if she is dead, the inheritance mentioned in the first clause is not construed to be the same as that in the second, the force of the contrast expressed by the connective *but* is lost, and the evident scope and unity of the sentence, shown by the force of expression adopted, entirely disregarded. I am constrained, therefore, to adopt such construction, and to proceed at once to the inquiry whether the inheritance came to the intestate "on the part of his mother."

By section 29 of the same chapter, it is provided that the expression used in said chapter, "when the estate shall have come to the intestate on the part of the father," or "mother," as the case may be, it shall be construed to include every case where the inheritance shall have come to the intestate by devise, *gift*, or descent from the parent referred to, or from *any relative of the blood of such parent.*

William Samuel Ward took his estate in the thirty-two lots, under and by virtue of the following clause: "And, in consideration, as aforesaid, I give and grant all and singular the said lands and their appurtenances, from and after the death of the said Emily, unto her surviving issue and their heirs and assigns forever." The consideration, as aforesaid, here mentioned is, "the natural love and affection which I (John Jacob Astor) have to my said granddaughter Emily, and of one dollar to me paid by her, and by William B. Astor, John Ward, and Daniel Lord, Jr.," the trustees.

The estate did not come to the intestate on the part of his mother, unless it came to him by *gift* from her grandfather, John Jacob Astor, through the said deed. Was the conveyance a deed

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of gift, and did the intestate take the estate as a donee, is the question.

It is insisted, on the part of the Plaintiff, that inasmuch as the consideration of the conveyance was natural love and affection, *and* one dollar, the intestate was a purchaser for a valuable consideration, and not a donee of the estate—that the statute applies only to cases of *pure gifts*, where there is no valuable consideration whatever, and, consequently, that the inheritance did not come to the intestate by gift, within the meaning of the statute.

It is entirely correct, I think, to say that the statute applies only to cases of *pure* gift, and not to cases of mixed consideration, partly valuable, and partly *good*, consisting of natural love and affection.

Such mixed consideration cannot be divided so as to cause the estate to descend partly in one direction, and partly in the other, according to such division.

The valuable consideration, however small, is sufficient to support the conveyance in its whole extent, and reaches, and must be applied to every part of its subject-matter; so that if in this case the one dollar mentioned in the deed of settlement *is* a part of the *actual* consideration, it results in making the intestate a purchaser for value, and not a donee; and though the estate came to him from a relative of the blood of his mother, not coming by devise, gift, or descent, it descends to his heirs generally, without reference to such blood—and under section one of the chapter above referred to, goes to the father in fee.

It is insisted on the part of the Respondent, that the one dollar mentioned in the deed as consideration is *nominal*, and not real, nor intended as consideration in fact—that the intent in that respect is a question of fact, made so by statute, and therefore that this Court is bound, by the finding of the referee, that the lands came to the said William Samuel Ward as a *gift*.

The statute to which the Respondent refers is as follows: "In the construction of every instrument creating or conveying, or authorizing the creation or conveyance of any estate or interest in lands, it shall be the duty of the courts of justice to carry into

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effect the intent of the parties, so far as such intent can be collected from the whole instrument, and is consistent with the rules of law" (1 R. S. 748, § 2, 1st ed.).

The conclusion as to the intent of the parties to an instrument in writing, to be collected from the whole instrument, is rather one of law than of fact—a duty for the Court, and not for the jury (St. John v. Bumpstead, 17 Barb. 100; Levy v. Gadsley, 3 Cranch, 180).

We are not, therefore, concluded by the finding of the referee above mentioned, but must determine for ourselves the question whether the one dollar forms any part of the actual consideration of the deed.

It is contended on the part of the Respondent, that the concluding clause in the deed, "these provisions are to be deemed an advancement to the said Emily out of my estate, and to be so accounted under my will, and the said lands and bonds and mortgages are, for such purpose, valued at $200,000," show the conveyance to be a gift, being substituted for the legacy, which would have been undeniably a gift.

There is much strength in this position of the Respondent, and I do not think it is answered by saying that, after exhausting the value of the legacy, there may have been in the property conveyed something more which might have been the subject of purchase.

The language of the grantor in the last clause of the deed is, "*these provisions are to be deemed an advancement.*" This characterizes the whole estate and interest conveyed, and leaves no room for the proposition that there was anything conveyed which could be the subject of a purchase.

It was wholly and entirely an advancement, and, if an advancement, necessarily a gift. The declaration is not, as suggested by the Appellant's counsel, that it shall be taken as an advancement *to the amount* of $200,000.

If it were, the construction claimed for it might prevail. But "these provisions," that is, the estate, interest, and property conveyed and transferred, "are to be deemed an *advancement* to the

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said Emily *out of my estate*," and, as such, are to be "valued at $200,000." It is manifest that there is no portion of "these provisions" excepted from the category of advancement, and that the entire property transferred by the deed is a substitution for the legacy.

In addition to the declaration above mentioned, there are in the deed various restrictions and limitations tending to show that the conveyance was intended as a mere gift, and not a sale for a quid pro quo; such as the restriction against the disposing or the encumbering, by the said Emily, of her life estate in the property, and the provision that, in any such event, the estate granted to her should determine, and should thereafter vest in trustees, to receive the rents and profits, and apply them to her use; the limitation of the power of giving by will to her husband not exceeding the one-fourth part of the present property transferred to her; the limitation upon the estate given to her surviving issue, contained in the power authorizing her, with the concurrence of the trustees named, to make leases of any of the lands thereby conveyed for a term of twenty-one years, containing covenants for the payment for valuable erections thereon, which should bind the lands and the parties in remainder in respect of their estate. Also authorizing her, with the like concurrence, to sell or mortgage not more than one-third in value of said lands, and the same to convey in fee-simple the moneys proceeding from said sales, to be applied to the improvement of the residue of said lands, by erections of a permanent nature. These restrictions and limitations tend strongly to show the donative character of the conveyance—that it was intended, not as a sale for a valuable consideration, but as a voluntary provision out of the estate of the grantor for his granddaughter Emily and her issue—a mere substitute for the legacy which he had provided for her in his will.

In collecting the intent of the grantor from the whole instrument, therefore, I think the referee was warranted in the conclusion at which he arrived, that such intent was to convey the whole property, which passed by the deed to his granddaughter and her surviving issue, as a gift; and hence that the one dollar mentioned

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in the conveyance was a mere *nominal*, and not an actual portion of the consideration.

It was held by the learned Assistant Vice-Chancellor Sandford, in Hayes v. Kershaw (1 Sandf. Ch. R. 265), that "the nominal consideration of one dollar (like that of five shillings in England), which the Courts may know judicially is not usually paid, is not such a valuable consideration as will support a bargain and sale." In Duvoll v. Wilson, Ex'r (9 Barb. 487), it was held by the Supreme Court, sitting in the seventh judicial district, Judge Selden delivering the opinion of the Court, that when the Defendant's testator had given a deed to the Plaintiffs, his grandchildren, expressed to be in consideration of $5 paid and the testator's affection for the Plaintiffs, and in which deed was a covenant against incumbrances, that, inasmuch as the deed was to be deemed a voluntary one, for natural love and affection merely, the action brought to compel the Defendant to pay off a mortgage would not lie, for want of a sufficient consideration to support the covenant.

Although it is not necessary, and I am not disposed to go so far as these cases have gone, and hold that the presumption in cases of such slight money consideration, connected with the consideration of natural love and affection, is, that the money consideration is merely formal, nor to go out of the deed itself for evidence that it was not paid, nor intended to be, yet I think it is competent, when the whole instrument shows it to have been intended as a *nominal* consideration merely, to give effect to such proof and to the intention which it indicates.

The practice to insert a pecuniary consideration of small amount, in gratuitous conveyances, which nominal sum is not generally paid, is, as the learned counsel for the Appellant admits, so general that it may almost be pronounced universal. In some cases it is necessary to the validity of the conveyance, as when the gratuity is to a person not of the blood of the donor. In other cases it is unnecessary, as when the donee is a near blood relative of the donor. In either case, if the conveyance itself shows the intent of the party making it to be a gratuitous transfer of the

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property, the statute requires that such intent shall prevail over any technical rule of construction. In the case at bar the Appellant's counsel invokes the rule that the grantor in a deed is presumed to know the legal meaning and effect of the legal terms and forms used therein, and from it insists upon the inference that the grantor in this deed inserted the one dollar consideration to indicate his intention that the grant should not be considered wholly a gift. It would be very difficult to overcome this obstacle to the construction which I have adopted, if the answer was not found in the deed itself. But when the grantor himself in effect declares, that he did not use the formula as showing an actual consideration and indicating a purchase, we are compelled to disregard the technical rule of construction, and take the fact as thus declared to us. As was remarked by the learned Judge Duer in Langdon *v.* Astor's Ex'rs (3 Duer, 555): "Rules of construction may still, with great propriety, be invoked to aid in the discovery of a doubtful intention; but the declared will of the legislature will be set aside and nullified if they shall be permitted to defeat that which the Court, judging from the whole instrument, is satisfied corresponds with the mind of the parties."

If, then, "the provisions" in the deed of settlement—the *entire* property thereby conveyed, is an advancement out of the estate of the grantor—a mere substitute for the legacy contained in the will, I do not understand the learned counsel for the Appellant to deny—so far as the question arises out of the terms of the deed, and irrespective of the question of a marriage consideration—that it must be deemed, within the meaning of the statute, a gift to William Samuel Ward, the propositus.

The Appellant's counsel insist, however, that still it is not a gift, because, independently of the money consideration expressed in the deed, there was another actual valuable consideration for the conveyance, to wit, that of marriage.

That is not a consideration expressed in the deed, and consequently, whether it existed and operated as a consideration, is a question of fact arising aliunde.

The referee has passed upon that question of fact, finding ex-

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plicitly that there was no such consideration, and that finding, as the case stands before us, is conclusive.

From the conclusion at which I have arrived, that the property came to William Samuel Ward by gift from his mother's grandfather, it necessarily follows that the estate which Samuel Ward took in the undivided moiety of the property in question was an estate for his life only; and that the Plaintiff, by the conveyances made to him, acquired no greater estate therein.

In view of this conclusion, it is unnecessary to consider the question of estoppel discussed upon the argument arising under the various judicial proceedings which have been had respecting these lands.

The judgment appealed from should be affirmed, with costs.

All concur.

Affirmed.

JJ. BOOKES and PORTER not voting.

JOEL TIFFANY,
State Reporter.

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DAVID L. GARDINER, APPELLANT, v. JULIA G. TYLER AND HARRY BEECKMAN, RESPONDENTS.

Receiver, Compensation of—Discretion of Supreme Court.

The Supreme Court has authority to fix upon the compensation to be paid to a receiver appointed by it to receive and apply rents pending the controversy attending the probate of a will.

A receiver is an officer of the Court, and as such, in the absence of legislation upon the subject, the Court has authority to determine the compensation to be paid.

PARKER, J.—This is an appeal from two orders of the Superior Court, made under the following circumstances:

The action was brought for the appointment of a receiver of the rents of the estate of Julianna Gardiner, deceased, pending a contest before the surrogate of Richmond county, respecting the validity of her alleged will, the probate of which was being contested by the Plaintiff; and James J. Roosevelt was appointed such receiver, and qualified as such.

The surrogate having decided against the validity of the will, and refused to admit it to probate, an appeal was taken to the Supreme Court, and the General Term in the second district reversed the decree of the surrogate, and sent the case back, with the direction that the will be admitted to probate, which was accordingly done.

At this stage in the proceedings, a motion was made in this suit by the Defendants to dismiss the complaint for unreasonable neglect of the Plaintiff to proceed in the action, whereupon it was, on the 2d day of June, 1866, ordered as follows: "That the complaint in the above-entitled action be, and the same is hereby dismissed, with costs; and that all orders heretofore granted as provisional remedies herein are vacated and set aside." No further judgment appears to have been entered in the action.

After the above order was made, and on the 27th of November, 1866, an order was obtained whereby the receiver was directed to

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pass his accounts before a referee named, and to pay over and apply what the referee should certify to be due from him as receiver, to the satisfaction and payment of the unpaid taxes which were due, and a lien upon the real estate of the said Julianna Gardiner, deceased, situate in the city of New York, prior to her decease; and that he transfer and deliver to the Defendant, Julia G. Tyler, all deeds, leases, and property which may have come into his possession as such receiver. This order, it appeared by affidavits on the part of the Defendants, was entered by consent of the Plaintiff, given in open Court, though not so stated in the order.

The referee therein named proceeded to take the account, and made a report whereby he certified as remaining in the hands of the receiver the sum of $3,416.72, to be applied to the payment of taxes as directed by said order. In the statement of the account, as allowed, are several items of credit by the receiver to the estate, of rent from G. Bradley, of which the following is a specimen: "By cash from G. Bradley, for rent, $1,300;" and among the items allowed to the receiver are the following: "To cash paid, sundry taxable costs, charges, and disbursements, including attorney's fees, &c., in five foreclosure suits, $125; commissions on $13,175.93, at 5 per cent., $658.79."

The Plaintiff excepted to the allowance of five per cent. commissions upon the whole amount of the moneys received and paid out; also to the allowance of $125 costs and attorney's fees in five foreclosure suits, and claimed that disbursements only should have been allowed; also "that the referee has reported the sums received for rents from G. Bradley, when he should have reported the sums received from tenants, instead of the sums received for rents, diminished by the charges of said Bradley."

These exceptions were heard before the Court, at Special Term, on the 17th of January, 1867, and were all overruled, except that the one as to the receiver's commissions is so far allowed that the one-third of said commissions allowed over and above the sum of $251.75 (trust $135) was deducted from the commissions charged, and added to the balance certified by the referee as in the hands

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of the receiver, and the report was in all other respects confirmed. From this order of the Special Term an appeal was taken to the General Term, and the order was, on the 18th of April, 1867, affirmed.

This order of affirmance is one of the orders from which the Plaintiff has appealed to this Court.

In the controversy respecting the will, the judgment of the Supreme Court, reversing the decision of the surrogate, was, on appeal to this Court, on the 2d of January, 1867, reversed, and thereupon the Plaintiff in this action moved the Supreme Court, at Special Term, on the 15th of March, 1867, for an order modifying the order of November 27, 1866, so as to direct the receiver to pay the balance in his hands to this Plaintiff, instead of paying the same upon the taxes in said former order specified.

This motion was denied, and from the order denying it the Plaintiff appealed to the General Term, where the order was affirmed.

This order of affirmance is the other order brought here by the appeal.

The appeal from the first-mentioned order brings up for review the exceptions to the referee's report upon the accounting of the receiver.

The exception stating "that the referee has reported the sums received for rents from G. Bradley, when he should have reported the sums received from tenants, instead of the sums received for rents, diminished by the charges of said Bradley," is not founded upon any fact which appears from the papers before us.

The statement in the account, "By cash from G. Bradley, for rent," is the only statement of fact upon the subject, and the legitimate inference from this is that Bradley was the tenant, and not the middleman implied in the exception.

This exception was, therefore, properly overruled.

In regard to the allowance of the charges in the receiver's account of $125, for taxable costs, &c., in five foreclosure suits, the exception claiming it to be erroneous, on the ground that disbursements only should have been allowed, assumes that the

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receiver acted as attorney in those suits, and was claiming the costs and attorney's fees for himself as such attorney.

There is nothing to show that such was the fact, but the inference is, from the terms of the charge, that he paid that amount to some other attorney, for his services as such in the suits. It is not necessary, therefore, to examine the question whether the charge contains anything which the receiver could not properly charge if he performed the services himself, or an attorney of the Court. This exception was also properly overruled.

The five per cent. allowed by the referee, as commissions upon the amount received and paid out by the receiver, was not all allowed by the Court, and yet the Appellant complains that it was not reduced to the rate allowed to executors and administrators, which, he insists, is the legal rate in cases of this kind also.

The statute does not fix the compensation to be allowed to receivers appointed under section 244 of the Code, as this one must have been, except that it is provided in the said section (subdivision 4) that receivers of the property, within this State, of foreign corporations, shall be allowed the same commissions as are allowed by law to the trustees of the estates of absconding, concealed, and non-resident debtors, which is five per cent. upon the whole sum which shall have come into their hands (2 R. S. § 31, 1st ed.).

Although in regard to the compensation of trustees, in the absence of any statutory provision therefor, it has come to be the settled rule of the Courts to allow only the same commissions as the statute allows to executors and guardians for similar services, I do not think the rule applicable to receivers appointed by the Court, in actions pending therein. "A receiver is an officer of the Court, and, as such, in the absence of legislation, the Court has the authority to determine his compensation (Magee *v.* Cowperthwaite, 10 Ala. 966; Edwards on Receivers, 642). Such is the established rule of the Court of Chancery in England, where the amount of compensation, or *salary*, as it is called, allowed to a receiver, is often left to the master to fix with reference to the trouble and labor of the case (Day *v.* Croft, 2 Beav. 488; Potts *v.* Leighton, 15 Ves. 273). I do not find that the

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right of the Court to fix the receiver's compensation, when the statute has not done so, is denied by any case in this State; nor do I find that the rate of compensation fixed by the statute for executors and guardians, has, by the Courts, been applied to receivers. The course of legislation on the subject indicates, I think, that such rate does not apply; for the legislature has limited the compensation of receivers, in the case of moneyed institutions, to the rate allowed by law to executors and administrators (Sess. Laws 1842, chap. 3). If that rule applied before, this was unnecessary, and the application of it to that class of receivers alone implies that it is not to apply to any other class.

If the Supreme Court, which appointed the receiver in this case, had authority to determine the rate of his compensation, as I think it had, there is no error in its exercise, and no error in the order now under consideration. In regard to the other order, I can discover, from the papers before us, no good reason why it should be reversed. The order of 27th November, 1866, which the Plaintiff sought to modify, directed the receiver to pay over and apply the moneys in his hands upon the unpaid taxes which were due and a lien upon the real estate of the said Julianna Gardiner, situate in the city of New York, prior to her decease; and this direction was made by consent of the Plaintiff. Now the Plaintiff asks the Court to modify that order, and direct those moneys to be paid over to him; and such would be the effect of a reversal of the order appealed from. The parties to this action are the heirs-at-law of the said Julianna Gardiner, deceased, and no facts are shown why the Plaintiff, one of them, is entitled to these rents and profits; nor why the application of them to the arrears of taxes, to which the order of 27th November devotes them, is not a perfectly equitable disposition of them with reference to the rights of all parties. Moreover, it is shown by the affidavits on the part of the Defendants, that another action is pending in the Supreme Court, involving the question of the Plaintiff's right to them.

Under such circumstances the Supreme Court was right in refusing to modify the order, as moved for by the Plaintiff.

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The orders appealed from should be affirmed, with $10 costs.
All concur.
Order affirmed.

JOEL TIFFANY,
State Reporter.

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JOSEPH BURNETT ET AL., RESPONDENTS, v. EDWARD PHALON ET AL., APPELLANTS.

Trade-mark—Infringement, what—Injunction.

Every merchant or manufacturer of an article has the right to establish for his own exclusive use a trade-mark, which becomes his property, and the Courts will protect by injunction or otherwise his use of the same. Any counterfeit or imitation of such mark calculated to impose upon the public, is an infringement of such mark, and will be prohibited by injunction.

E. W. Dodge for Appellants.
John Sherwood for Respondents.

DAVIES, CH.J.—This action was brought to restrain the Defendants from manufacturing, using, selling, or in any manner disposing of a compound or preparation with the name "Cocoine," or "Cocoaine," printed or stamped upon the bottles, labels, wrappers, covers, or packages thereof; also from using the word "Cocoaine" or "Cocoine" upon any wrappers, labels, or trade-marks, and also from manufacturing, selling, or offering for sale, any preparation or compound under the name of "Cocoine" or "Cocoaine;" and also from imitating, in any manner, the trade-mark "Cocoaine;" and that Defendants may account to the Plaintiffs, and pay over to them the profits of all the said material sold under the simulated name and trade-mark above set forth.

Upon the trial by the Court, without a jury, the following facts were found.

1. That in or about the month of November, 1856, the Plaintiffs, druggists and apothecaries, compounded from cocoa-nut oil, and other ingredients, a mixture used as a hair-wash, for which they devised as their trade-mark a name, word, device, or title never before used, by which to mark their said compound, to wit, the name or word "Cocoaine," and that they published the same

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very extensively, with notice that they had adopted said name or title as their "trade-mark," to secure the public and the proprietors against imposition, and that all unauthorized use of this trade-mark would be promptly prosecuted; that the Plaintiffs then and thereupon introduced their said compound into the market, and expended a sum exceeding ten thousand dollars in advertising, publishing, and introducing the same.

2. That in or about the month of November, 1858, the Defendants, Edward Phalon and Henry L. Phalon, composing the firm of Phalon & Son, of the city of New York, hair-dressers and perfumers, commenced the preparation and sale of a similar compound, in bottles not unlike those containing the Plaintiffs' compound, and with labels under the name and title of "Cocoine," and that they have since manufactured and sold large quantities thereof.

3. That the Defendants, well knowing that the name, word, or title of "Cocoaine" was, and for a considerable time had been the trade-mark of the Plaintiffs, with the wrongful intention of inducing the public to believe that the compound sold by themselves under the name, word, or title of "Cocoine" was that of the Plaintiffs; and with the wrongful intention of securing to themselves the benefit of the skill, labor, and expense of the Plaintiffs, had so closely imitated and used the aforesaid trade-mark of the Plaintiffs as to deceive the public and injure and endamage the Plaintiffs. That the word, name, title, or device "Cocoine" is a spurious and unlawful imitation by the Defendants of the word, name, title, or device "Cocoaine," the aforesaid trade-mark of the Plaintiffs.

4. That there was no evidence to support the Defendants' allegations that the Plaintiffs have in any manner committed any fraud, or imposed upon the public.

5. That the Plaintiffs are entitled to the relief demanded in the complaint, that the Defendants be perpetually enjoined and restrained from the further imitation and use of the aforesaid trade-mark of the Plaintiffs, and that the damages which the Plaintiffs had sustained they were entitled to recover.

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Such damages having been ascertained, judgment was rendered accordingly for the Plaintiffs; and on an appeal to the General Term, the same was affirmed. Upon the facts found by the Court, the right of the Plaintiffs to the relief granted is clear and indisputable. The Plaintiffs have adopted, appropriated, and used a certain trade-mark. This has become their property, and, for its protection from invasion or use by others, the Plaintiffs are entitled to invoke the aid of courts of justice.

We have the ascertained facts before us, that the Defendants are using a spurious and unlawful imitation of the Plaintiffs' trade-mark. This they cannot be permitted to do. The cases in the Courts of this State have firmly established this doctrine (Coats *v.* Holbrook, 2 Sand. Ch. R. 586, and cases there cited; Taylor *v.* Carpenter, ib. 603; same case in Court of Errors, ib. 611; Patridge *v.* Monck, ib. 622; Williams *v.* Johnson, 2 Bos. 6; Stokes *v.* Landgraff, 17 Barb. 608; Wolfe *v.* Goulard, 18 How. Pr. R. 64; Clark *v.* Clark, 25 Barb. 76; Brooklyn White-Lead Co. *v.* Masury, ib. 416).

The rule is nowhere laid down with more clearness and accuracy than by Mr. Justice ~~Drew~~, in his elaborate and able opinion Duer in the case of the Amoskeag Manufacturing Company *v.* Spear (2 Sand. S. C. Rep. 599). He thus says: "Every manufacturer, and every merchant for whom goods are manufactured, has an unquestionable right to distinguish the goods that he manufactures or sells by a peculiar mark or device, in order that they may be known as his in the market for which he intends them, and that he may thus secure the profits that their superior repute as his may be the means of gaining. His trade-mark is an assurance to the public of the quality of his goods, and a pledge of his own integrity in their manufacture and sale. To protect him, therefore, in the exclusive use of the mark that he appropriates, is not only the evident duty of a Court, as an act of justice, but the interests of the public, as well as of individuals, require that the necessary protection shall be given." Upon the facts proved by the Court on the trial of this action—and such finding is conclusive upon this tribunal—the judgment of the Superior

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Court of New York was correct, and should be affirmed, with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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GEORGE FARNHAM ET AL., RESPONDENTS, v. WILLIAM M. MALLERY, APPELLANT.

Executors can enforce Bond to pay Mortgage on Testator's Real Estate.

Where a party has, for a good and sufficient consideration, given his bond to executors, that certain parties who are legally bound to do so shall pay and discharge a mortgage upon the real estate of their testator, he cannot, on breach of the condition of his bond and suit commenced thereon, object to the capacity of such executors to sue on such bond.

The form of the judgment against such obligee should be, that he pay and cause to be cancelled of record, the mortgage, within a time specified, and in default, that he pay the amount due, &c.

George T. Spencer for Appellant.
J. U. Dininny for Respondents.

DAVIES, CH.J.—The Plaintiffs' claim in this action is based upon a guarantee of a bond made by Laurence Mallery and Hiram W. Bostwick to the Plaintiffs, in these words:

"Know all men by these presents that we, Laurence Mallery and Hiram W. Bostwick, of Corning, Steuben county, New York, are held and firmly bonded unto George Farnham and Henry Womburgh, both of Addison, Steuben county, New York, executors of the last will and testament of William Womburgh, deceased, late of Addison, in said county of Steuben, in the sum of seven thousand dollars, lawful money of the United States of America, to be paid to the said George Farnham and Henry Womburgh, executors, as aforesaid, the survivors or survivor, or his or their assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated 26th day of June, in the year 1834.

"The condition of this obligation is such, that if the above bounden Laurence Mallery and Hiram W. Bostwick, their heirs, executors, or administrators, shall well and truly pay and satisfy of record, or cause to be fully paid and satisfied of record, and

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fully discharge a certain indenture of mortgage made and executed on the sixth day of September, 1831, by Robert Miller to Isaac Bronson, then of the city of New York, to secure the payment of the sum of three thousand five hundred dollars and interest, which mortgage is on the lands conveyed to said William Womburgh, now deceased, by the said Laurence Mallery and his wife, by deed bearing date the 26th day of January, in the year 1847, which lands are situated in the town of Big Flatts, Chemung county, New York, and which mortgage is duly recorded in Chemung county clerk's office, and which is to be paid, satisfied, and discharged by the above-bounden Laurence Mallery and Hiram W. Bostwick, as follows, viz.:

"One thousand dollars and all of the interest on said $3,500 due on the first day of July, 1855, and all that shall remain unpaid, after making the said payment, on the first day of July, 1855, as aforesaid, of the said sum of $3,500, together with all the interest thereon, shall be fully paid on the first day of July, 1856, and the mortgage shall be fully satisfied and discharged on the same first day of July, 1856, so that it shall be no longer a lien or encumbrance on said lands, nor of any force or effect, without fraud or delay, then the preceding obligation to be void, otherwise to remain in full force and virtue."

The Defendant, William M. Mallery, on the 26th day of June, 1854, did make, execute, and deliver to the Plaintiffs, as executors, as aforesaid, his written guarantee of said bond or obligation, and which was annexed to said bond, and is in these words:

"For and in consideration of the sum of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I do hereby become surety for the punctual payment of all moneys, and full performance of all of the conditions and covenants in the annexed bond mentioned, to be paid, done, and performed by Laurence Mallery and Hiram W. Bostwick, and if any default shall be made by them, or if they shall refuse or neglect to fully pay or fulfil all or any of the payments, or perform all or any of the conditions mentioned in said bond, at any time, I hereby agree to pay and fully satisfy and discharge the mortgage men-

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tioned in said bond, and fully perform in every respect all of the agreements and conditions mentioned in said bond, and at and within the time therein stated."

The complaint averred that on or about the 26th day of January, 1847, the said Laurence Mallery sold and conveyed to the said William Womburgh, by a warranty deed of that date, certain pieces and parcels of land therein described. That before said sale and conveyance, to wit, on or about the 6th day of September, 1831, one Robert Miller, who was at that time the owner of said lands, executed and delivered to Isaac Bronson a mortgage upon said lands to secure the payment to said Bronson of the sum of $3,500, which mortgage was, at the time of the sale and conveyance aforesaid, a subsisting and valid lien and incumbrance upon the said land. That said Laurence Mallery, at the time of the sale and conveyance aforesaid, promised and agreed with the said William Womburgh that he would, within six months thereafter, pay, satisfy, and cause to be discharged of record the said mortgage.

That in consideration of the sale and conveyance aforesaid, and the promise or agreement aforesaid, made by the said Laurence Mallery to pay, satisfy, and discharge of record as aforesaid the said mortgage, the said William Womburgh paid to the said Laurence Mallery about the sum of $11,000. That the said William Womburgh died on or about the 21st day of May, 1853, leaving a will, wherein and whereby he appointed these Plaintiffs executors of his last will and testament, who did, before the making of the said bond or writing obligatory, by said Laurence Mallery and Bostwick, above set forth, duly qualify and enter upon the discharge of the duties of executors of said last will and testament. That the said Laurence Mallery had neglected to pay, satisfy, or discharge the mortgage aforesaid, and that the same still remained a valid and subsisting lien and incumbrance upon the lands aforesaid, at the time of the making of the said bond or writing obligatory. The complaint further averred that said Laurence Mallery and Bostwick, for the purpose of securing to these executors, as aforesaid, the payment, satisfaction, and discharge of the mortgage

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aforesaid, which still remained a lien and incumbrance aforesaid, and for a valuable consideration, made, executed, and delivered to said Plaintiffs said bond or writing obligatory. The complaint also averred, that for the purpose of securing the punctual payment of all the moneys, and the performance of all the conditions and covenants mentioned in said bond, by said Laurence Mallery and Bostwick, the said Defendant made, executed, and delivered to them the written guarantee therein set forth, and which has been already described.

The said complaint further averred that the said Laurence Mallery and said Bostwick had not, nor had either of them, paid, or caused to be paid, or satisfied of record, the said mortgage, or any part thereof; nor had the said Defendant Mallery paid, or caused to be paid, or satisfied of record the mortgage aforesaid, although often requested so to do, but that the same still remained a valid and subsisting lien and incumbrance upon the land aforesaid.

Wherefore the Plaintiffs demanded judgment that the Defendant pay and satisfy, or cause to be paid and satisfied of record, the mortgage aforesaid, or that he be adjudged to pay the Plaintiffs the sum of $7,000, or so much as may be sufficient to pay and satisfy of record the mortgage aforesaid, or such other relief and judgment as the Court should see fit to grant.

To this complaint the Defendant demurred, and assigned the following causes of demurrer.

1. That it does not appear by the complaint that the Plaintiffs have legal capacity to sue as executors.

2. That there is a defect of parties in this, that the said Isaac Bronson is a necessary party, and is not made a party Plaintiff herein.

3. That there is a defect of parties, in that the said Robert Miller is a necessary and proper party, and is not made a party Defendant herein.

4. That there is a defect of parties, in that the said Laurence Mallery is a necessary and proper party Defendant, and is not made a party Defendant herein.

5. That there is a defect of parties, in that said Bostwick is a

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necessary and proper party Defendant, and is not made a party Defendant herein.

6. That said complaint does not state facts sufficient to constitute a cause of action.

7. That it appears by the said complaints that the Plaintiffs are not entitled to the relief therein demanded.

8. That it does not appear in or by said complaint that letters testamentary or of administration have been issued to the Plaintiffs, or at what time, or by what Court or authority.

9. That it does not appear in or by said complaint that the Plaintiffs, at the time of the commencement of the action, or at any other time, had any estate or interest in the lands upon which said mortgage was a lien or incumbrance, or that the Plaintiffs were in any way injured or prejudiced by the existence of said lien or incumbrance.

10. That it does not appear in or by said complaint that the Defendant has had any notice of any breach of any of the conditions of the bond set forth in the complaint, of the refusal or neglect of the obligors therein to pay or fulfil all or any of the payments, or perform all or any of the conditions mentioned in said bond.

11. There is no sufficient breach of any of the conditions of said bond set forth in the complaint alleged therein.

12. There is no sufficient breach of the agreement of the Defendant stated or alleged in said complaint.

Judgment was given for the Plaintiffs, overruling said demurrer at Special Term, unless the Defendant, within thirty days, should answer on payment of costs. Said order, on appeal, was affirmed at General Term.

The cause coming on again to be heard at Special Term, judgment was again rendered for Plaintiffs for the amount then due upon the said bond and mortgage, amounting to the sum of $3,686.47, and the costs of this action. And, upon appeal to the General Term, said judgment was affirmed, and the Defendant now appeals to this Court.

The Supreme Court correctly held that the grounds assigned

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in the demurrer interposed by the Defendant presented no obstacle to the Plaintiffs' recovery.

The engagement or contract of the Defendant with these Plaintiffs was absolute, that in the event Laurence Mallery and Bostwick should fail in the performance of their covenants, then the Defendant agreed to pay and fully satisfy and discharge the said mortgage to Isaac Bronson, and fully perform in every respect all the covenants and agreements contained in the bond of Laurence Mallery and Bostwick, on their part to be done and performed.

The prayer of the complaint was that the Defendant should pay and satisfy, or cause to be paid and satisfied, the said mortgage to Isaac Bronson, or should be adjudged to pay to the Plaintiffs a sum sufficient to pay and satisfy of record the said mortgage.

As already observed, the judgment of the Supreme Court is that the Defendant should pay absolutely to the Plaintiffs the amount of the said judgment. In this I incline to think that Court erred, and that the judgment should have been that the Defendant should pay and satisfy, or cause to be paid and satisfied of record, the said mortgage to Isaac Bronson, within thirty days from the date of said judgment, or, in the event of his not doing so, then that he pay to the Plaintiffs the amount of the said judgment.

With this modification, I am for the affirmance of the judgment, with costs.

BOCKES, J.—This is an appeal from a judgment of the Supreme Court, in favor of the Plaintiffs, on demurrer to the complaint.

The case made by the complaint is as follows: Laurence Mallery owned lands, on which there was a mortgage lien of $3,500.

He sold and conveyed the lands to William Womburgh, by warranty deed, and agreed with the latter to assume, pay off, and discharge the mortgage. Womburgh died, and the Plaintiffs were appointed his executors. For the purpose of securing performance of the agreement, to satisfy the mortgage, Mallery, with Hiram W. Bostwick as his surety, made a bond to Womburgh's executors, in the penal sum of $7,000, conditioned that they would

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satisfy and discharge the mortgage by instalments—the last one to be paid on the 1st July, 1856.

The Defendant, thereupon, and by a separate instrument, under seal, became surety for Mallery and Bostwick, and agreed that in case they should neglect or refuse to fulfil the condition of the bond, he would perform it according to its terms.

All the parties having omitted performance of the condition, this action was instituted to enforce the Defendant's obligation.

The facts above recited are all alleged in the complaint, and very manifestly show a good cause of action.

The case, briefly stated, is this: The Defendant covenanted and agreed with the Plaintiffs that Mallery and Bostwick should satisfy and discharge the mortgage. They omitted so to do, as did also the Defendant; the latter was, consequently, in default on his agreement.

The Supreme Court was very clearly right in giving judgment for the Plaintiffs on the demurrer.

Nor was the complaint open to any technical or formal objection as a pleading.

The Plaintiffs were authorized to maintain the action as executors. It is averred that William Womburgh was dead, and that they had been duly appointed the executors of his will and testament; and it also appears that the bond and instrument of suretyship were made to them as such executors. The Defendant, having made the agreement with them as executors, is estopped from denying their right to bring the action in their representative capacity; and it must be assumed, too, that they have an interest in the enforcement of the agreement. The Defendant, by his agreement, was under personal engagement to them as executors; and having broken his covenant with them, they could enforce his liability.

The only difficulty in the case is in the form of the judgment.

The judgment, as entered, is absolute—that the Plaintiffs recover the amount remaining unpaid on the mortgage, to wit, $3,686.47, with interest from October 4, 1858.

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There is no security that the Plaintiffs will appropriate the recovery to the payment of the mortgage debt.

If collected by them, they may refuse, or become unable to satisfy the debt with the money, and leave the bond to be enforced against the obligor.

There should be a provision in the judgment to meet this contingency.

If the executors had, in fact, paid off the debt and satisfied the lien, there would then be no difficulty; their recovery should then be absolute for the amount paid.

But this they have not done. They have yet suffered no damage, and the action is brought with a view to protect them (and those interested through them in having the agreement fulfilled) from injury.

The action is for a specific performance of personal covenants —a specific performance of an agreement of indemnity.

There was no difficulty, consequently, in so framing the judgment or decree as to meet the requirements of the case, and protect the rights of all interested in the subject-matter of the action, although not parties.

The judgment should have been to the effect that the Defendant specifically perform his covenant and agreement, by satisfying and discharging the mortgage within a time to be specified, or, in default thereof, the Plaintiffs recover judgment against him for the sum remaining unpaid on the mortgage; that judgment be forthwith docketed against him for such amount, to stand as security and to be enforced by execution, in case of his neglect to satisfy and discharge the mortgage within the time specified; that, in case of sale or collection under execution, the sheriff bring the amount collected into Court to abide its order, and that the Plaintiffs be at liberty to apply to the Court for further relief, if necessary. Also, that the Plaintiffs recover the costs and disbursements of the action.

This, in my judgment, should have been the form of the decree.

I am therefore of the opinion that the judgment of the Supreme Court in favor of the Plaintiffs, on the demurrer to the complaint,

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should be affirmed, with costs, but with a modification of the details in accordance with the above suggestions. And in my judgment the Defendant should be charged with the costs on the appeal to this Court. The litigation is without excuse on his part.

His agreement was clear and specific, and, for aught that appears, was fairly and understandingly entered into.

It should have been faithfully performed.

The modification now suggested is formal merely, and is to meet a contingency which may arise in case of justification by him in his unfaithfulness. He should therefore reap no benefit from it.

The judgment against him is in effect affirmed; and it should, as I think, be with costs of appeal.

On consultation, the judgment was modified in accordance with opinion of DAVIES, Ch.J.

JOEL TIFFANY,
State Reporter.

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NATHANIEL HAYWARD, APPELLANT, v. THE LIVERPOOL AND LONDON FIRE AND LIFE INSURANCE COMPANY, RESPONDENTS.

Insurance—Loss by Fire occasioned by Explosion—Steam-engine.

In a policy of insurance upon a building in which there is a steam-engine, a clause exempting the company from liability, when the loss by fire is occasioned by any explosion, must be construed as applicable to an explosion of the engine within the building, as well as to the explosions of any kind without the building; and the fact that an extra premium was paid on account of the increased risk from the engine within the building does not change the construction.

PARKER, J.—The provision in the policy, that the company will not be liable to make good any loss or damage by fire, which shall happen or arise by any explosion, repeated in the conditions appended, and referred to in the policy, must, I think, be taken to include an explosion of the steam-engine insured, as well as any external explosion.

There is no inconsistency in such construction with the fact that the engine itself was insured against fire. The company might well say: We will insure your factory, engine included, against fire produced from every cause, except an explosion of the engine. So far from there being any inconsistency in this, it is impossible to say that it was not a wise and reasonable provision, intended to induce carefulness in the management of the engine, and to refuse the risk of carelessness in its use. It is said the Defendant has been paid an extra price for the risk caused by the engine. Still, the exception in the risk of its explosion is not inconsistent with that fact. Undoubtedly the use of a steam-engine, and without respect to its liability to explode, increases the hazard of loss by fire to a building in various ways, which sufficiently accounts for the extra charge for insurance, where one is used. In the case of Harper v. The Albany Mutual Ins. Co. (17 N. Y. R. 194), relied upon by the Defendants, the doctrine affirmed was, that in construing a policy of insurance, the intent

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of the parties is to be gathered from both the written and printed portions, and effect given to both, so far as can be; but in case of repugnancy between them, the written part shall prevail over the printed part; and the principle was illustrated by the learned judge who gave the opinion of the Court, in the following manner: "When the insurance is directly upon the stock in trade, as, for example, in the business of manufacturing and sale of camphene, to hold that a general printed prohibition (contained in every policy of insurance) against keeping or using it, unless permission be specially given and endorsed upon the policy, would have the effect to nullify its direct and positive stipulations, would be preposterous."

The case at bar is very different from that of Harper v. The Albany Mutual Insurance Co.; and as we have seen that there is no repugnancy between the insurance of the engine against loss by fire and the exception of loss and damage by fire occasioned by the explosion of the engine, it is not within the principle of that case.

The inquiry always is, is there between the exception and the scope of the undertaking in the policy any repugnancy? If not, in construing the policy the intent of the parties is to be gathered from both the written and printed portions, and effect given to both, according to the ordinary rules of construing written contents.

I am of the opinion that the judgment of the Supreme Court is right, and should be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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JOHN McCLELLAND, RESPONDENT, v. GEORGE REMSEN, SHERIFF OF KINGS COUNTY, APPELLANT.

Partnership—Any Partner may secure Creditor.

Either member of a firm has a right to secure a creditor thereof by a transfer of partnership property, or to give a chattel mortgage for that purpose.

APPEAL from Supreme Court. The action was for trespass in seizing goods of the Plaintiff. The Defendant claimed to justify under a judgment and execution in favor of William F. Howe, against William McClelland and Elizabeth Hasluck, alleging the property seized belonged to one or both of the Defendants in the execution.

The cause was tried at the Kings Circuit, before Mr. Justice Lott, and resulted in a verdict for the Plaintiff of $394.55.

It appeared on the trial that, on the 1st of February, 1860, or prior thereto, Elizabeth Hasluck, a married woman, formed a partnership with William McClelland, in the liquor business, in Brooklyn, and that they conducted it in the firm-name of William McClelland & Co. On the 2d of June, 1860, they were indebted to the Plaintiff, John McClelland, in the sum of $357, for liquor and cigars sold and delivered to the firm.

On that day William McClelland, in the name of the firm, executed an instrument transferring to John McClelland the goods and other property of the firm, upon the trust that he should convert the same into cash, and, after satisfying this debt of $357, with interest, and the charges and expenses incident to the assignment, should pay over the balance of the net proceeds to the firm. Attached to the instrument was the bill, the payment of which it was intended to secure. Some weeks afterward, the bill remaining unpaid, the Plaintiff went to the store, demanded and received possession of the goods, and locked them up. Subsequently, an execution was delivered to the Defendant, who seized the property as that of the assignors. The judgment under which it was issued was confessed by Mrs. Hasluck, and she assumed to confess it for McClelland as well as herself.

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The judge held that the assignor was not justified, and directed a verdict for the Plaintiff, to which the Defendant excepted.

This decision was sustained at General Term, in the Second Judicial District, and the Defendant appealed to this Court.

N. F. Waring for Appellant.

James Troy for Respondent.

PORTER, J.—It was the right of either member of the firm to secure the Plaintiff, as one of its creditors, by a transfer of partnership property (Mabbett *v.* White, 2 Kernan, 443; Graser *v.* Stellwagen, 25 N. Y. 315).

The assignment, in this instance, was in the nature of a mortgage. It did not divest the entire title, but left a residuary interest in the assignors, which could be reached by their other creditors. Its primary purpose was to secure the payment of the debt, and the trust to account for the surplus was purely incidental. Such a trust is not within the condemnation of the statute, and such a reservation is not unlawful (Leitch *v.* Hollister, 4 Comstock, 211; Curtis *v.* Leavitt, 15 New York, 141; Dunham *v.* Whitehead, 21 id. 131.)

The judgment of the Supreme Court should be affirmed.

GROVER, J.—No grounds were stated upon which the motion for nonsuit was made. Hence no question arising upon that motion can be entertained in this Court. Nothing was lost by the omission, as the only possible grounds were, that one partner could not dispose of the entire stock of the firm to secure or pay a debt; and that the transfer to the Plaintiff was fraudulent and void on its face.

The first of these questions was decided by this Court against the Defendant in Mabbett *v.* White (2 Kern. 443), and the last in Leitch *v.* Hollister et al. (4 Com. 211).

All the judges concurring.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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CHARLES FREDERICK RUSSELL, APPELLANT, v. WILLIAM H. RUSSELL AND OTHERS, RESPONDENTS.

Will—Executor—Trustee—Power to sell Real Estate.

Where the testator bequeathed and devised all his estate to his wife during her life, or widowhood, with remainder to his four children, and afterwards by codicil authorized his wife to sell and dispose of his real and personal estate, or any part of it, as she should deem most expedient for the best interest of all his legatees, held, that this did not authorize her to deed certain real estate to one of the children, in payment of a debt due him from the estate.

LABAN RUSSELL, the father of the Plaintiff, and of the Defendants William H. Russell, Mary Ann Jewett, and Laban G. Russell, departed this life in the month of September, 1842, seized and possessed of real estate in the town of Rye, in Westchester county.

He had previously made a will, dated 18th April, 1833, by which he gave all his estate to his wife during her life or widowhood, with remainder to his said children, and, in case of the death of either, to his or her issue, and appointed his wife and his son, William H. Russell, executors.

Subsequently, and on the 6th of September, 1842, he made a codicil to his will, by which he gave the following direction: "I do hereby will and direct that my said beloved wife Mary, my executrix in my said last will and testament named, shall have full power and sole authority, at any and at all times, in her discretion, to sell and dispose of my said real and personal estate, or any part thereof, at public or private sale, as she shall deem most expedient and for the best interest of all my legatees in my said last will and testament named, giving and granting my said executrix full power to convey the same, by deed or otherwise, as she may be advised is most effectual and correct to vest the title to the same in the purchaser or purchasers thereof."

The said will and codicil were proved before the surrogate of Westchester county on the 14th day of November, 1842, and letters testamentary thereon were on the same day granted to Mary

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Russell alone, who, thereupon, assumed the execution of said will and codicil.

On the 9th of March, 1843, the said Mary Russell made and executed a deed to her son William H. Russell, who, at that time, although named as executor with her in the will, had not qualified or acted as such, by which she conveyed to him a piece of the land at Rye, of which the testator died seized, containing fifteen acres of land, more or less.

The consideration expressed in the deed was $3,000, and consisted, as found by the Justice who tried the issues in the action, "of moneys to that (and a greater) amount due to the said William H. Russell from the said testator at the time of his decease, which remained unpaid at the time of the execution of the said deed, and the claims for which have not been barred under the Statute of Limitations, and was applied, by mutual consent, in satisfaction of such consideration."

William H. Russell qualified as executor on the 6th day of October, 1862.

The testator left personal property to the amount of $3,800, real estate to the value of $15,000, and no debts except that to William H. Russell, the Defendant.

The said Mary Russell departed this life on the 22d day of April, 1855, and in October, 1857, this action was commenced by the Plaintiff, one of the heirs and devisees of the said Laban G. Russell, for the purpose of setting aside the above-mentioned deed and the subsequent conveyances.

The said William H. Russell and his wife, and the other heirs and devisees of the said Laban G. Russell, together with Joseph Dean, in whom the title to the premises had been vested, and who subsequently reconveyed to the said William H. Russell, who is now the owner thereof, are made parties Defendant.

The Justice at Special Term dismissed the complaint; the Supreme Court, at General Term, affirmed the judgment thereon, and the Plaintiff now appeals to this Court.

Jesse C. Smith for Appellant.

Henry C. Murphy for Respondent.

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HUNT, J.—By his will, executed April 18th, 1833, the testator gave all his real and personal estate to his wife, during her life or widowhood, with remainder to his four children, and named his wife and his son William as executors.

By a codicil of September, 1842, the testator gave power to his wife, Mary Russell, "to sell and dispose of my real estate, or any part thereof, at public or private sale, as she shall deem most expedient, and for the best interest of all my said legatees, in my said will named."

By the expression "legatees," in the codicil, the testator intended to designate his four children whom he had named in the body of the will as those to whom he "devised and bequeathed" the residue and remainder of his estate, real and personal, after the death of his wife. In the execution of this power of sale the widow had no interest.

It was to be executed as she should deem expedient, not for her own benefit or advantage, but for the best interest of those entitled to the estate after her death, viz.: the testator's four children, described by him as his legatees. The income only belonged to her, and the corpus of the estate belonged to the children exclusively.

It was a general power in trust in the widow (1 R. S. 732, §§ 77, 79, 94, 106).

Was the power well executed by the conveyance of a portion of the testator's real estate to one of his sons, in satisfaction of a debt due to him from the testator? The executrix had no power or control over the real estate in her character of executrix.

There was personal property enough for the payment of the testator's debts, without calling upon his real estate, and the real estate was not liable to that purpose until the personal had been exhausted.

It was not liable at any time, except upon the presentation of a petition to the surrogate, alleging the insufficiency of the personal estate, and asking the application of the real estate to that purpose.

Of such an application all parties interested in the real estate

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would be entitled to notice, and they would have the right to litigate the proceeding. No such proceeding was had in the present case.

This circumstance is important here in a double respect. It shows, in the first place, that the transaction is to be sustained solely upon the ground of the execution by the widow of a power in trust; and secondly, it relieves the case from the question of the effect of a conveyance by one co-executor or co-trustee to his associate. William H. Russell was not a co-executor at the time of the conveyance to him, in so far as he had not then quali fied. He was not a co-trustee in any event, as the power in trust was given to Mrs. Russell exclusively.

The authority to Mrs. Russell to sell was in its terms general, unrestricted as to time, place, or circumstance. It required, however, that the transaction should be a sale, and it must be based upon her conviction that such sale was for the best interest of all the legatees named in the will.

In my opinion she had no power under this clause to convey, in settlement of a claim against the testator's estate, or in payment of a debt conceded to be due from him.

The duty of the payment of debts belonged to the executor; and, as already stated, real estate could not be applied to that purpose, except upon certain contingencies not existing in the present case.

The judge, however, finds specifically that the conveyance was made in satisfaction of a debt due from the testator to William H. Russell, and was applied to that purpose by mutual consent. By this is meant, I suppose, a mutual arrangement between the trustee and William H. Russell, and not by an arrangement with the parties here litigating.

I think this was not a good execution of this power; and that, having knowledge of the trust, no title passed to William H. Russell by the deed of March 9, 1853, from his mother (1 R. S. 730, § 65).

In the case of Allen v. Dewitt (3 Coms. 276), the executor of Simeon Dewitt was empowered to sell in this language: "I em-

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power my executors to sell all my estate, both real and personal, not specially bequeathed or devised, in such parcels, at such times, and for such considerations as they shall judge proper, for the purpose of discharging my debts, and creating funds for the support of my family, and on such sales to give the proper legal conveyances. After my debts shall have been paid, the avails of my property shall be equally divided among all my children."

Before the testator's debts were paid, the husband of one of the daughters procured from the executors a conveyance of certain lots, and mortgaged them to the Plaintiff in that suit.

Nothing was paid for the land; but the husband agreed to protect the estate against the mortgage, or, in default thereof, that the value of the land might be charged against his wife's distributive share in the estate.

On a bill filed to foreclose the mortgage, given by the husband and wife pursuant to this arrangement, it was held that the conveyance was not an execution of the power contained in the will, and passed no title. The sale was sought to be supported on the argument that it was, in effect, a division of the avails of the estate, and a setting apart of this parcel to the wife in satisfaction of her claim as one of the children of the testator. It was held, however, first, that a division was only authorized after the payment of debts, while this conveyance was made before the debts were paid; and secondly, that the power required an absolute sale for a fixed consideration, which should form a fund for the maintenance of the family, and for ultimate division. In Briggs v. Davis (20 N. Y. R. 15) the grantees of land in trust for the payment of debts reconveyed to the grantor, reciting that the trusts had been executed. The debtor then mortgaged the land to one having no actual notice of the trust. It was held that the reconveyance, being in contravention of the trust, was void, and that the legal estate remained in the trustees.

In Roome v. Philips (27 N. Y. R. 357) the will directed the executor to sell and convey the real estate "upon such terms as he may think proper, and most beneficial to his estate."

It was held that this did not authorize a conveyance in fulfil-

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ment of a contract made by the testator in his lifetime. The Court says: "The manner and terms of sale had been fixed by the testator before the will took effect by his death. The power does not look to the conveyance of the naked title to lands of the beneficial interest in which the testator had divested himself in his lifetime."

So stringent is the rule on this subject, that even legislative action cannot avoid its effect.

Thus, in Powers v. Bergen (2 Seld. 359), lands had been devised to trustees for the use of the testator's daughter for life, with remainder to her issue living at her decease, and, for want of such issue, to all her grandchildren.

During the life of the daughter (she having children living) a statute was passed authorizing the trustees to sell the land, pay certain expenses and liens, and invest the surplus in securities to be held in trust as the lands were held under the will.

It was held that the act was beyond the power of the legislature, and that the trustees could give no title to lands sold in pursuance of it. (See Smith v. Bowen, 35 N. Y. R. 83; see also the cases of Waldron v. McComb, 1 Hill, 111, and S. C. 7 Hill, 335, arising upon the will of Medcef Eden.)

I do not think that the fact that the debt is a valid one is an answer to the difficulties suggested. Whatever doubt there might have been as to its validity is removed by the finding of the Judge, and I assume the existence of a valid debt. I have endeavored to show that the discharge of such an obligation belonged to the executor, and was no part of the duty of the trustee. Neither is it an answer to place the case upon the ground assumed below, that the widow, having acknowledged the receipt of $3,000 for this land, has rendered herself chargeable as executrix to that amount; and, having paid the same amount in discharge of a valid debt, no injustice would be committed by allowing the deed to stand. This is a short cut toward justice which tramples upon the principles of law, and confounds the distinction between a question of power and one of convenience.

If the view I have taken be sound, the trustee had no power to

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make the conveyance; and the fact that she is ready, as executrix, to account for the money received, has no relevancy to the subject.

No title passed by the attempted execution of a power, and the estate descended to the remaindermen unaffected by her act.

I think the judgment should be reversed, and a new trial be ordered.

All concur, except DAVIES, Ch.J., and GROVER, J.

JOEL TIFFANY,
State Reporter.

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SAMUEL THOMAS, RESPONDENT, v. HORACE HUNT AND ANDREW KINGSLEY, APPELLANTS.

Contract, Written, cannot be varied by Parol Evidence.

A written agreement between parties must be regarded as containing the whole of their agreement upon the subject-matter thereof, and as merging therein all prior and contemporaneous understandings. Therefore, evidence offering to establish other facts and conditions as part of the contract, which are not contained in the agreement, is inadmissible.

S. G. Hadley for Respondent.
P. Carter and *Scott Lord* for Appellants.

DAVIES, CH.J.—The Plaintiff in this action claims to recover the value of a quantity of stone delivered to the Defendants, under a contract made between the Plaintiff and his partner, Levi Reynolds, and the Defendants, dated January 25, 1855.

By this agreement the Plaintiff and his partner, parties of the first part, agreed to deliver to the Defendants, parties of the second part, at such points on the Erie Canal as said parties of the second part should designate, in sections 214 to 229, both inclusive, of the Erie Canal Enlargement, all the stone necessary and proper for building all the culverts on said sections on said canal, which had been let to the said parties of the second part by canal officers; "*said stone to be of the sizes and qualities such as the engineer in charge of the work on said section shall approve.*" Said stone to be delivered, as soon as they reasonably could be, after the opening of the navigation upon the canal in the spring then next ensuing. The contract contained other provisions not needful to recapitulate. The complaint averred performance of the contract on the part of the parties of the first part, and that a quantity of stone had been delivered under said contract, "which had been estimated and measured in the wall, by the engineer in charge of the said works, as mentioned in said

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contract," and that there was due therefor the sum of $3,455.14; and also due from the Defendants the sum of $90, for fifteen days' detention of the boats of the said parties of the first part, at the rate of $6 a day, as provided for in said contract. The complaint also averred that the interest of said Reynolds in said claims and demands had been assigned to the Plaintiff.

The answer of the Defendants contained:

1. A general denial of all the matters mentioned in the complaint, except as to the making of the contract.

2. That the Defendants had fully paid for all the stone delivered.

3. That the parties of the first part had not delivered all the stone called for by said contract, and that those delivered were not proper for the purpose specified, nor of the sizes or qualities required by said contract, nor were they delivered at the time contemplated by said contract; and the Defendants claimed they had suffered loss and damage by reason of the non-performance of said contract on the part of the said parties of the first part, to the amount of $2,400.

The action was referred to a referee, who found, as matter of fact, that the agreement, as set forth in the complaint, was made and entered into between the parties therein; that Reynolds, before the commencement of this action, had transferred all his interest in said agreement to this Plaintiff; that before such assignment Reynolds and the Plaintiff had partially performed the same on their part, and that since said assignment the said Plaintiff had continued the performance thereof.

That all the stone required by the said Defendants, under said agreement, were furnished to them by the said Reynolds and the Plaintiff, or by the Plaintiff alone, in accordance with, and in fulfilment of the contract, and were received by the Defendants; that said Reynolds and the Plaintiff furnished stone to the cutters of the Defendants, at the yard of the Plaintiff, as fast as the same were needed by the said cutters; that the Plaintiff and said Reynolds commenced to deliver said stone at the places designated by the Defendants, on the Erie Canal, after the open-

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ing of the canal in the year 1855, and so continued until the whole quantity were delivered, on or before the month of November in that year, in a reasonable time after said opening; and that there was then delivered $224\frac{31}{100}$ cubic yards of stone for arches, and $702\frac{73}{100}$ cubic yards of other stone; that the stone thus delivered amounted, at the price stipulated for in the contract, to the sum of $3,176.34; that the Defendants have paid therefor the sum of $2,307, and that there is still due and owing to the Plaintiff, from the Defendants, the sum of $869.34, with interest from the 20th of November, 1855. And he also found, as conclusions of law, that the Plaintiff and the said Reynolds, or the Plaintiff alone, had fully kept and performed the said agreement; that the Defendants had not fully kept and performed the same, and that they were indebted to the Plaintiff in the sum of $869.34, and interest thereon from the 20th of November, 1855.

Judgment was accordingly entered, upon the report of the said referee, for the Plaintiff, and on appeal the same was affirmed at the General Term. The Defendants now appeal to this Court.

Upon the facts found by the referee, no question can seriously be made that the Plaintiff was not entitled to the judgment which has been rendered in his favor. If no error has been committed by the referee before the trial, in the admission or rejection of evidence, no ground is presented to this Court for interference with the judgment appealed from.

But two exceptions were taken to the rulings of the referee, which are now urged before us as erroneous.

1. On the trial, the Defendants offered to show that at the time of making this contract a large quantity of good stone were lying in the yard of the Plaintiff, and near the quarry, and that such stone were shown to Defendants as samples of their stone, and that the stone furnished to be cut were of even inferior quality to those, and cost much more to dress them, and were not as suitable for the work.

Plaintiff objected to the introduction of this evidence, and the same was excluded, and the Defendants excepted.

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The ruling of the referee was clearly correct. The evidence was properly excluded for several reasons.

1. The written contract between the parties must be regarded as containing the whole of their agreement upon the subject-matter thereof, and as merging therein all prior and contemporaneous conversations, stipulations, and negotiations in relation thereto (Renard v. Lampson, 2 Kern. 561).

2. The testimony offered tended to contradict, alter, and vary the written contract between the parties. In the agreement it was stipulated that the size and quality of the stone were to be such as the engineer in charge of the work should approve. The offer was to show that the stone to be delivered was to be like a sample exhibited at the time of the execution of the contract, and that the stone delivered was of an inferior quality to the sample.

It was not competent for the Defendants thus, by parol, to alter, vary, or contradict the written contract.

3. The Defendants had set up no such ground of defence in their answer, and the testimony offered was not pertinent to any issue which they had raised by their answer.

No application was made to amend their answer in this particular, and under the answer and amended answer it was clearly irrelevant and immaterial.

The effect of the admission of the testimony offered was to substitute a new contract between the parties, and a new and different defence from that raised by the answers.

2. This question was put to one of the Defendants, a witness:

"How long would it have taken to build 218, if you had had the stone ready, as contemplated in the contract?"

To this question the Plaintiff objected, and the referee sustained the objection, and the Defendants excepted.

This testimony was sought to be elicited manifestly for the purpose of proving the amount of damage sustained by the Defendants, on the assumption that the stones were not furnished at the time provided for in the contract.

It assumed what had not appeared, and contrary to the fact

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found by the referee—namely, that all the stone called for by the contract was furnished by the Plaintiff and Reynolds, as required by it.

The exclusion of the question, upon this finding of facts, worked no injury to the Defendants, and presents therefore no ground for granting a new trial.

The judgment should therefore be affirmed, with costs.

All affirm.

JOEL TIFFANY,
State Reporter.

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DAVID C. FOSTER, APPELLANT, v. CORNELIUS VAN WYCK ET AL., ASSESSORS, &c., RESPONDENTS.

GEORGE VAN KLEECK, APPELLANT, v. FREDERICK WOODRUFF, COLLECTOR, &c., RESPONDENT.

CHARLES W. SWIFT, APPELLANT, v. THE CITY OF POUGHKEEPSIE, RESPONDENT.

Assessors, protected like all Judicial Officers.

It being the duty of assessors to ascertain and determine all taxable property, real or personal, within their town or ward, subject to taxation, they have jurisdiction to make the necessary investigation in respect to all property, and they are not liable for any errors they may commit in thus exercising the duties of their office. Their office, in this respect, is judicial, and in the discharge of its duties they are within the rule of protection extended to all judicial officers.

PARKER, J.—These are controversies submitted to the Supreme Court, without action, pursuant to section 372 of the Code.

The facts stated to the Court in the several submissions, which are substantially alike, show that the Plaintiffs are residents of the city of Poughkeepsie, and respectively owners of shares in three National Banks, organized under the act of Congress, approved June 3, 1864, and located in said city.

The assessors of that city, in the year 1865, assessed the Plaintiffs, respectively, for their shares in the said banks, at their par value. The Plaintiffs did not personally appear before the assessors, nor serve any claim or notice on them in reference to said assessment. The assessors made out an assessment roll in the form prescribed by statute, on which each of the Plaintiffs were assessed and taxed for other property; and at the close of the alphabetical list, and on a separate part of the roll, they inserted the names of the said National Banks, and the value of the real estate of each, and then, under the name of each bank so entered, they entered the names of the shareholders therein respectively, the numbers of the shares owned by each, and the par value

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thereof; and the Common Council imposed and extended the tax upon the real estate of each bank, and upon each shareholder for the value of his shares so entered.

The cashiers of the banks, before the completion of the roll, notified the assessors that such last-mentioned assessments were illegal, and demanded that they should be stricken from the roll. This was refused by the direction of the Common Council; a warrant was issued to the collector, under the seal of the city and the hand of the mayor, attached to the assessment roll, and with it delivered to the collector, commanding him to receive, levy, and collect from the several persons therein named the several taxes therein imposed.

Under this warrant, the collector, on the 7th of June, 1866, levied and collected the several taxes imposed on such bank shares of the Plaintiffs, respectively, for their goods and chattels, and did forthwith pay the same to the chamberlain of said city, who is, ex-officio, treasurer thereof.

On the part of the Plaintiffs it is claimed that the said assessments, and all proceedings based thereon, were without jurisdiction and void; and that the levy on their goods and chattels, in pursuance of said warrant, and by direction of said city, was a trespass, for which the Defendants respectively are liable to the Plaintiffs, in the amount so collected from them.

On the other hand, the Defendants claim that the assessors had jurisdiction in the premises, and admitted that the bank shares were exempt from taxation; that the Defendants, respectively, are not liable to any action by reason of said assessments, &c., but that the Plaintiffs, having omitted to institute legal proceedings to compel the correction of said assessment roll, by the Court or otherwise, are remediless in the premises.

The Supreme Court held that the Plaintiffs were neither of them entitled to recover, and gave judgment for the Defendants respectively to that effect, and for costs.

From the judgment thus given the Plaintiffs severally appeal to this Court.

The question in each case is, did the assessors have *jurisdiction*

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in respect to the assessments complained of? for it is not denied, on the one hand, that under the decision of the Supreme Court of the United States, in Van Allen v. The Assessors (3 Wallace, 573), the assessment was unauthorized, and would have been set aside upon due application to the Supreme Court, as not being in accordance with law; nor, on the other, that if the assessors had jurisdiction in the matter, and have erred only in its exercise, the only remedy of the Plaintiffs was such application to set it aside; and that no action for the irregularity would lie against any of the Defendants; except that in the case of Swift v. The City of Poughkeepsie, it is claimed by the Plaintiff that, even if the assessors had jurisdiction, so that they and the collector are not liable, still as the Plaintiff was not legally liable to taxation on his bank shares, the city, which has received the money collected from him to satisfy such illegal tax, is legally liable to refund it to him.

That the assessor had jurisdiction in the matter cannot, I think, be successfully disputed.

Taxation of all property is the general rule of the statute. It provides as follows: "All lands, and all personal estate within this State, whether owned by individuals or corporations, shall be liable to taxation, subject to the exemptions hereinafter specified" (1 R. S. 387, § 1, 1st ed). By the same statute (p. 390, § 8), it is made the duty of the assessors "to ascertain, by diligent inquiry, the names of all the taxable inhabitants in their towns or wards, and also all the taxable property, real or personal, within the same." It is not denied that the assessors had jurisdiction of the Plaintiffs, as taxable inhabitants of their towns or wards. As to the property in question, it falls within the description of property declared by the first section of the act above quoted to be liable to taxation. It is "personal estate," as the same is defined by the third section of the act, the term including "public stocks," and "stocks in moneyed corporations." It may also fall within one of the exemptions; but being property primâ facie liable to taxation, and the duty of the assessors being to ascertain all the taxable property, real and personal, within their town or ward, this property, held by residents of their town, presents itself to them

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for their decision whether it is taxable or exempt from taxation. That it shall turn out to be exempt from taxation does not exempt it from the scrutiny required of them by the statute, to ascertain whether or not it is taxable. Being personal property within their town or ward, it is within their jurisdiction as assessors; they have the right, and it is their duty, to examine the question whether it is liable to taxation, and this is a judicial inquiry (1 Kern. 593; 3 Denio, 117)—one, it may be remarked, in which the highest Courts have differed; and should they make a mistake, and hold it liable to taxation when it is not, surely they should not, for such mistake, be held liable as wrong-doers (Chegary v. Jenkins, 1 Seld. 376; Barhyte v. Shepherd, 35 N. Y. R. 238; Vail v. Owen, 19 Barb. 22; The Rochester White-Lead Co. v. The City of Rochester, 3 Coms. 463).

One of the classes of property expressly exempted by § 4 of the act from taxation is, "Every building erected for the use of a college, incorporated academy, or other seminary of learning." In Chegary v. Jenkins (supra), the building occupied by the Plaintiff as a young ladies' boarding and day school, was taxed, she claiming that it was exempt; and the collector levied on her property to collect the tax. Judge Ruggles, in his opinion, discussing the question of jurisdiction, says: "The assessors, in determining whether the Plaintiff's property was taxable as a dwelling, or exempt as a seminary of learning, acted judicially, and within the sphere of their duty. . . . Having the general authority to make assessments for taxation within the ward in which the Plaintiff's property was situated, they had jurisdiction of the subject-matter of the assessment in question." See also Henderson v. Brown (1 Caines' R. 92). Section 4 of the act in effect allows ministers of the gospel to hold property to the amount of $1,500 exempt from taxation. In Barhyte v. Shepherd (35 N. Y. R. 238), the Plaintiff, a minister of the gospel, sued the assessors for refusing to exempt him from taxation, although his real and personal estate were worth less than $1,500; and it was held that the assessors had jurisdiction to decide whether the Plaintiff's property was exempt or not; and in so deciding acted judicially, and

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were not liable for assessing the Plaintiff upon his property, even though it was exempt from taxation.

It cannot be said that the bank shares in these cases were any more absolutely exempt from taxation than "a building erected for the use of a seminary of learning," or the farm of a minister of the gospel, occupied by him, and of a value not exceeding $1,500. If the building on the farm turns out to be exempt, because found to be in the category of exemptions, it is as absolutely non-taxable as the bank shares in question; and yet the assessors are not liable for improperly including it in the assessment, because they are invested by the statute with authority to decide what property is taxable, and in so deciding act judicially.

It can make no difference, I apprehend, in regard to the assessors' jurisdiction, whether this immunity from taxation arises from state law or national law. In either case, the question of liability to taxation is to be determined by the assessors, and they have, of course, jurisdiction to decide it.

It is equally a judicial decision in either case, having equal protection from liability for having decided erroneously.

It is impossible to make any distinction, in respect to the subject under consideration, between the case at bar and the cases last cited; and, as was said by Judge Leonard in Barhyte *v.* Shepherd, after remarking upon the holding in Mygatt *v.* Washburn (15 N. Y. R. 316), that assessors have no jurisdiction to assess a non-resident for personal property: "It is not necessary to extend the application of the rule on any ground of public policy, that I can perceive, so as to include cases of mistake in deciding a claim to exemption, where the person and estate of the party are within the jurisdiction of the assessor."

The circumstance that the assessment of the bank shares was separate from the other personal property of the Plaintiffs, and specifically upon the shares, does not affect the question of jurisdiction. If the assessors, having jurisdiction of the subject-matter, and of the persons of the Plaintiffs, have failed to follow the directions of the statute in making up their roll, their action was irregular, and open to correction upon proper application to

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the Supreme Court; voidable, but not void (Easton v. Calendar, 11 Wend. 91, 95; Cunningham v. Bucklin, 8 Cow. 187; Wilson v. The Mayor, &c., of New York, 1 Denio, 595, 599; Butler v. Potter, 17 John. R. 145; and cases above cited). The rule is stated in Easton v. Calendar as follows: "Where the magistrate or officer has jurisdiction of the subject-matter, and errs only in the exercise of it, his acts are not void, but voidable, and the only remedy is by certiorari or writ of error."

In regard to the liability of the city of Poughkeepsie to refund the taxes paid into its treasury, and under the assessments in question, I am unable to see how it can be. The assessment was not void, but irregular or erroneous; and the only mode of avoiding such an assessment is by an application to the assessors, or by a proceeding in the Supreme Court to correct the errors or irregularities while the assessment stands unreversed; it is as effectual to protect not only those by whom it was made and executed, but all persons claiming under it, as a judgment of a Court having jurisdiction. It would be an error to hold that no liability attached to those who instituted and carried out the proceedings to compel the payment of the money by the Plaintiffs (there being no statutory protection), and yet that the individual or corporation who received it is legally liable to refund it.

The cases cited by the learned counsel for the Appellants, holding that "when a tax has been *illegally* assessed and collected, the money may be recovered back," are cases where there was, in the view of the Court, a want of jurisdiction. In Osborn v. Danvers (6 Pick. 89), it was held that when a taxable inhabitant is overrated by assessors, whether by including in the valuation property of which he is not the owner, or that *for which he is not liable to be taxed*, that does not render the assessment invalid or void, and his only remedy is by an application to the assessors, or the Court of Sessions, which is authorized to relieve in such cases, and not by an action for money had and received.

I am of the opinion that the judgment appealed from should be affirmed.

As to the case of Foster v. Van Wyck *et al.*, assessors, and Van

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Kleeck v. Woodruff, collector, all the judges concur in affirming the judgments.

As to the case of Swift v. The City of Poughkeepsie, a sufficient number of the judges to give a judgment failing to concur, a reargument in that case is ordered.

Judgment affirmed in the first and second cases, and reargument ordered in the third case.

JOEL TIFFANY,
State Reporter.

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AMELIA TRAVER, BY A. BULL, GUARDIAN, RESPONDENT, v. THE EIGHTH AVENUE R. R. CO., APPELLANT.

Appeal—Misnomer, no ground—Injury—Loss of Service, by whom recoverable.

Under the Code of Procedure, the only way to take advantage of a misnomer is by answer. Where the answer omits to set up such misnomer, no advantage can be taken of it on trial.

A mere misnomer is only a formal error, and is amendable in the Court of original jurisdiction, and not entitled to notice in this Court.

Where a child under age is injured, &c., the parent may recover for loss of service until the child attains the age of twenty-one years; and if the injury continue beyond the period of legal majority, the child may recover for such further loss.

THIS action was brought by the Plaintiff, in her maiden name, to recover damages of the Defendant for an injury alleged to have been caused by the carelessness of the Defendant's servants while the Plaintiff was a passenger upon one of its cars. After the injury was received, and before the commencement of this action, the Plaintiff intermarried with one Collins.

The Plaintiff was about eighteen years old at the time of the injury, and but a few months past twenty-one at the time of the trial.

Upon the trial, evidence was received as to how much the Plaintiff could earn per week prior to the injury, and that some money had been expended in taking care of her the last year preceding the trial, to which the Defendant's counsel excepted.

The Defendant moved for a dismissal of the complaint upon the ground, among others, that the action was improperly brought in the maiden name of the Plaintiff, but should have been brought in the name acquired by marriage. The Court denied the motion, and Defendant's counsel excepted.

It appeared that an action had been previously brought by the Plaintiff's mother, and a recovery had for the loss of services of the Plaintiff, and the expense of taking care of her.

The Court charged the jury that nothing could be recovered for

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these causes in the present action. The jury rendered a verdict in favor of the Plaintiff for twenty-five hundred dollars.

The Special Term of the Superior Court of New York denied a motion for a new trial. Judgment was entered on the verdict, which was affirmed, on appeal, by the General Term, from which the Defendant appealed to this Court.

J. H. Reynolds for Respondent.
J. W. Ashmead for Appellant.

GROVER, J.—Commencing the action in the maiden name of the Plaintiff, instead of that acquired by marriage, was a misnomer merely. There was no pretence but that the Plaintiff was the proper person to sue, and the only one that could maintain an action for the injury sought to be redressed. Under the practice prior to the Code, misnomer of either party could only be plead in abatement of the action (Graham's Pract. 2 v. and cases cited). Neglecting to interpose such plea waived any advantage to the Defendant therefrom. The mistake was amendable by the Court. The misnomer was not ground of nonsuit upon the trial. It was not like the case of bringing an action by the wrong party; that was ground of nonsuit. By the Code, pleas in abatement are abolished (Code, §§ 142–151). The only mode of presenting such a defence is, under the Code, by answer. No such defence is set up in the answer in the present case. It was, therefore, unavailable upon trial. In the Bank of Havana *v.* Magee (20 N. Y. 355), it was held that although there was no such corporation, and that it was only a name assumed by Charles Cook for the transaction of his banking business, yet bringing the action by Cook in such name was but a mere formal error, amendable in the Courts of original jurisdiction, and to be disregarded in this Court.

This case goes much further than it is necessary to go in the present. In that case, upon the papers, it would appear that the action was brought by a corporation, and not by Charles Cook, while in the present the Plaintiff was the same, whether called by the maiden or married name.

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The evidence of what the Plaintiff could earn before the injury was held by the judge not to be material, and the jury were instructed not to give any damages for loss of services, inasmuch as the Plaintiff's mother had previously recovered therefor. This direction would not have cured the error (if one was committed) in receiving the evidence, if that was such as was calculated to create a prejudice in the minds of the jury, and influence them in fixing the amount of damages, unless it appeared from the whole case that the jury were not so influenced (Erben v. Lorillard, 19 N. Y. 299). The evidence in the present case was not likely to influence the jury upon the question of damages, unless they were convinced that the injury of the Plaintiff was of a character to prevent her from attending to her business after she was twenty-one; and if so convinced, the evidence was proper for the consideration of the jury.

When a child under twenty-one is injured, the parent can recover for loss of service until the arrival of the child to that age, and, if the disability continues beyond that time, the child may recover for the loss. Upon this point the case was tried as favorably to the Defendant as the law required.

No claim for loss of service was made by the Plaintiff after she was twenty-one, and the jury were told that the mother had recovered for such loss up to that time. No ground of objection to the proof of what the expense of taking care of the Plaintiff had been, was stated. The exception to the proof does not, therefore, raise any question for the consideration of this Court.

The judgment appealed from must be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THE MAYOR, &c., OF NEW YORK, RESPONDENT, v. THE EXCHANGE FIRE INSURANCE COMPANY, APPELLANT.

Charter of the City of New York—Corporation Counsel—Corporation may employ additional Counsel.

The provision in the amended Charter of the City of New York, imposing on the Law Department the duty of conducting all the law business of the Corporation, was not intended to disable the City from prosecuting or defending suits without the consent of the Corporation Counsel; or to deprive it of the ordinary right of suitors to employ additional counsel when it deemed it necessary to do so.

APPEAL from judgment of the Superior Court of the City of New York, affirming judgment in favor of the Plaintiff, on the verdict of a jury, for $6,164.70.

The action was on a policy of insurance issued by the Defendant to the Plaintiff on the 23d of June, 1858, and covering the "Crystal Palace" building, which was destroyed by fire on the 5th of October following.

The principal grounds of defence were, that the suit should have been brought by a different attorney; that the corporation had no interest in the building which it paid the Defendant for insuring; and that the policy was forfeited by the continued use of the building for the purposes for which it was erected.

On the trial before Judge Woodruff and a jury, it appeared, among other things, that the lots on which the building was constructed belonged to the city of New York, in fee. On the 23d of March, 1852, the premises were leased for a term ending in January, 1857, at a nominal rent of one dollar a year, to Edward Rettle, in behalf of himself and his associates, for the purposes of the Association for the Exhibition of the Industry of all Nations, and the lease was assigned to that association upon the completion of its organization, a few days afterward. It appears on the face of the lease that the inducement to its execution was the proposed erection, on the vacant lots demised, of "a building of iron and glass, for the purpose of an industrial exhibition of all nations,"

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and upon the stipulation that the lessees should make such erection, and surrender the premises at the expiration of the term, in as good state and condition as reasonable use and wear thereof would permit, damages by the elements excepted.

The building was accordingly erected, and, until its destruction in 1858, it was always used for the purposes of industrial exhibitions, and for no others, except such as were incidental and appropriate to that object. This use involved the collection and operation within the building of various kinds of machinery and other industrial agencies, and the exhibition of a great variety of articles which would ordinarily fall in the classes of hazardous, extra-hazardous, and special risks, and the premium of insurance was fixed with reference to the contemplated use and the known character of the risks.

On the 15th of December, 1854, this property, with the other effects of the "Crystal Palace Association," passed into the possession of John H. White as receiver, and on the 31st of May, 1858, the term having expired, the city took possession, and the receiver surrendered it. The title and possession of the Plaintiff are unquestioned, except by the Defendant.

The purposes for which the building was always used, and the character of the articles and machinery exhibited within it, were generally known. The Defendants, under their former corporate title of the La Farge Fire Insurance Company, had repeatedly insured the building and its contents. They issued such a policy to the receiver in September, 1856, which was renewed in November, December, and January. They issued another in June, 1857, which was renewed in March, 1858; and the officers of the company were informed, on occasion of issuing such policies, of the fair of the American Institute being held there, as a reason for effecting the insurance. The descriptions in these successive policies substantially correspond with that to the Plaintiffs in the policies of 23d June, 1858; and the premium of $75 on the last policy, for a year's risk of $5,000, was at the same rate with the premiums previously exacted.

The policy described the insurance as "on the iron and glass

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building known as the Crystal Palace, situate on Reservoir Square, between Fortieth and Forty-second streets, and on the east side of Sixth avenue, in the city of New York, together with the furniture and fixtures now in the said building lately owned by the Association for the Exhibition of the Industry of all Nations, and since vested in John H. White as receiver, and also such other property lately vested in said White's hands as receiver, belonging to exhibitors, and lately in said White's custody and keeping, now remaining in said building." The policy contained the usual provisions and conditions of insurance. The term of the policy corresponded substantially with that of the lease from the city to the American Institute, which was made about the same time, at a rent of $6,000 a year.

The fire occurred some three months afterward, and the Plaintiff claimed only to recover in respect to the building, on which the loss largely exceeded the insurance.

The building was a permanent structure, covering some three acres of ground, connected in all its parts, and constructed on solid and fixed foundations.

Other facts appeared, which it is not material to state.

The jury found for the Plaintiff, and the judgment was affirmed at the General Term, the opinion of the Court being delivered by Barbour, J.

John W. Edmonds for Appellant.
Daniel Lord for Respondent.

PORTER, J.—There is no force in the objection that the attorneys who appear for the Plaintiff are not connected with the city law department. The provision in the amended charter, imposing on that department the duty of conducting all the law business of the corporation, was not intended to disable the city from prosecuting or defending suits without the consent of the "corporation counsel," nor to deprive it of the ordinary right of suitors, to procure such additional professional aid as the circumstances of particular cases might require. In this case it appears, affirmatively, that the action was brought with the assent of the corpo-

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ration counsel; but if there had been no proof on the subject, the authority of the attorneys would be presumed.

The objection that the Plaintiff had no insurable interest is equally unfounded. The Crystal Palace building, as well as the land on which it stood, belonged to the corporation. There is nothing in the terms of the expired lease, or in the evidence introduced by the Defendants, to give color to the claim they set up, in behalf of persons known or unknown, as an excuse for refusing payment, while they retain the premium of insurance.

The judge was right in admitting proof that the Defendants had insured the property for years, and knew the purpose for which the structure was erected, the manner in which it was occupied, the general character of its contents, and the nature and extent of the risk. These extrinsic facts were appropriate, as they tended to aid the Court in applying the descriptive language of the policy to the actual subject of insurance, and in giving effect to the words of the contract in the precise sense in which they were understood and employed by the parties (Bidwell *v.* Northwestern Ins. Co. 24 New York, 302; Agawam Bank *v.* Strever, 18 id. 509; Blossom *v.* Griffin, 14 id. 574; French *v.* Carhart, 1 id. 102).

When the policy is read in the light of the antecedent and surrounding circumstances, the import of the written language is in harmony with the manifest intention of the parties. The contract covered, and was designed to cover, the hazards incident to the occupation of the building for the purpose of exhibiting to the public the general processes and results of human skill in each of the various departments of active and practical industry. The premium was adjusted by the insurers with reference to the nature of the risk, and they cannot justly complain that the property was dedicated to the uses contemplated by them as well as the assured, and embraced in the descriptive terms of the policy (Harper *v.* Albany Ins. Co. 17 New York, 197; Townsend *v.* Northwestern Ins. Co. 18 id. 174; Hoffman *v.* Ætna Ins. Co. 32 id. 405).

Other questions were raised on the argument, but we think

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none of them call for particular discussion. The rulings of the judge were correct, and the liability of the Defendant is clear.

The judgment should be affirmed, with costs.

All the judges concurring,

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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RUFUS STORY, Respondent, v. ABRAHAM B. CONGER, Appellant.

Words—"Good and Sufficient Deed"—Construction—Real Estate.

An agreement to convey by a good and sufficient deed implies an agreement to make a good title.

On the 14th day of December, 1849, the Defendant and his wife conveyed to the Plaintiff certain real estate in the city of New York, and by the deed the Plaintiff covenanted that the premises were free and clear, among other things, of taxes and assessments. At the time of the conveyance there was a tax for the year 1849 of $189.31, which was a lien and encumbrance on the premises, and which the Defendant was then liable to pay.

The Defendant failed to pay the tax, and the Plaintiff paid the same on the 14th of February, 1850.

And for the recovery of the sum so paid, with interest, this action was brought.

The defence interposed is that, in conversation and negotiations between himself and the Plaintiff, in reference to the sale of the premises, it was understood that the Plaintiff was to take the same without the personal warranty or obligation of the Defendant, and that the Defendant was not to take any responsibility in respect to the title. A written agreement was entered into between the parties, by which the Defendant agreed to sell the premises to the Plaintiff, and convey and release the same to him by a good and sufficient deed; that the Plaintiff was then a tenant in possession; that the Defendant tendered to the attorneys of the Plaintiff, in his presence, a deed of the premises, without covenants or warranty; but they objected to the deed, alleging that a deed without the usual full covenants might throw suspicion on the title, and be an impediment in the way of disposing of the property, and urged the execution of a full covenant deed; and, to induce the Defendant to execute and deliver such a deed, they rep-

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resented to him that they had investigated the title to the premises, and that the same was perfect and free from all liens and encumbrance (except the mortgages referred to in the written agreement), and that the Defendant would incur no liability by giving the deed.

The Defendant, induced by and relying on such representations as true, executed and delivered the deed in the complaint mentioned; but such representations were untrue, and he was deceived thereby.

The Defendant prays judgment for the dismissal of the complaint, and that the deed be set aside, and another deed executed, pursuant to the agreement of sale, and in conformity with the stipulations, or that the covenants in the deed be declared inoperative and void as against the Defendant.

The Plaintiff, by his reply, denied all the material allegations of the answer.

The action came on for trial at a Circuit Court, held in and for the city and county of New York, on the 17th of May, 1859. The Plaintiff moved the Court, upon the pleadings, to direct the jury to find a verdict for the Plaintiff for the amount claimed in the complaint, on the ground that the answer did not state facts sufficient to constitute a defence to the Plaintiff's action, which was granted, and the Defendant excepted.

The jury rendered a verdict in favor of the Plaintiff for $311.87.

The exceptions were directed to be heard in the first instance at the General Term, and, after argument, judgment was given in favor of the Plaintiff for the amount of the verdict.

The judgment was entered, and the Defendant appeals therefrom to this Court.

James A. Seaman for Appellant.
Charles Jones for Respondent.

Hunt J.—Two questions are presented by the present demand for a new trial: First, was the Defendant, by the preliminary agreement of sale, which was in writing, of the date of November 30, 1849, bound to pay the tax in question? Secondly, if he was

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not, has he stated facts enough in his answer to entitle him to the relief he desires?

In the answer, this agreement of sale is set out at length. By its first provision the Defendant agrees to sell to the Plaintiff the property in question, for a sum specified, "and to convey and release the same to him, by a good and sufficient deed, on the 15th day of December, 1849." The purchaser then agrees to pay the Defendant the sum of seven thousand five hundred dollars, to assume the payment of a fifteen thousand dollar bond and mortgage, then a lien upon the premises, to procure himself to be substituted as bondsman or mortgagor therein, or to procure the indemnity of Moses Taylor against any liability to the Defendant thereon.

In the case of Burwell v. Jackson (5 Seld. 535), the party had agreed "to execute, or cause to be executed to the party of the second part, on the first day of June, 1836, a good and sufficient conveyance of a certain lot of land in the city of Buffalo."

It was held that this contract bound the vendors to convey a good title to the purchaser. Here the party contracts "to convey and release by a good and sufficient deed." I see no difference in the legal effect of these expressions. The intent of each is to express an obligation to transfer a good title, and whether that result is accomplished by a deed of release or by a deed with covenants, is not important. The good title in each case is the thing to be attained, and nothing less than an actual good title will satisfy the contract.

When the Defendant, therefore, executed a deed by which he covenanted that there were no arrears of taxes upon the lots conveyed, he assumed no greater liability than his preliminary agreement called for.

If he had given a quit-claim deed, he would have remained liable upon his original agreement for the amount of this tax.

He has but fulfilled his contract, and has no occasion to ask for the interpretation of the Courts in his behalf.

These views render unnecessary a discussion of the second question. It is quite possible, from the allegations of the answer, that there was some misconception of the effect of the Defend-

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ant's contract, and that there was some misunderstanding as to the fact of the existence of the tax in question. No fraud is suggested, nor is it alleged that a mutual mistake existed on the point in question.

One of these allegations is indispensable in a complaint asking for a reformation of the contract (Nevins v. Dunlap, 33 N. Y. R. 676).

Upon his own statement of the contract, the Defendant has done no more than he was legally bound to do. If unjust or immoral means have been resorted to, to induce him to perform that duty, there is no remedy.

In its result the case stands where and as it ought to stand (Hutchins v. Hutchins, 7 Hill, 104; Story's Eq. Jur. § 203; Randall v. Hazelton, 12 Allen R. 412, 415). Judgment should be affirmed.

All affirm, except JJ. BOCKES and PORTER.

JOEL TIFFANY,
State Reporter.

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BEARDSLEY SCYTHE COMPANY, APPELLANT, v. JOHN C. FOSTER, RESPONDENT.

Assignor's Creditor's right to assert Assignee's claim against Debtor.

A creditor is not relieved from compliance with the requirements of the statute by the alleged insolvency of the debtor, when he seeks to impeach the validity of an assignment as being fraudulent.

A creditor who has in no manner succeeded to the rights of one of the partners, who has become the assignee of the effects of the firm, cannot assert such assignee's rights to redress against those who may be indebted to the firm.

APPEAL from the Supreme Court. The action was for equitable relief, and, on the hearing, the referee dismissed the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The judgment was affirmed at General Term in the Seventh Judicial District, the opinion of the Court being delivered by Mr. Justice Johnson.

The complaint, in substance, alleges the following facts:

In 1857, and the early part of 1858, Wm. H. Osborn and George Clow were partners in the business of manufacturing grain cradles, at Port Byron, conducting it under the firm-name of George Clow & Co. They became indebted to the Plaintiff in the sum of $2,203.34. Afterward, and on the 11th of May, 1858, the partnership was dissolved; and in consideration, among other things, of Osborn's paying the debts of the firm, Clow transferred to him his interest in its assets. In consequence of this arrangement, Osborn became so much involved as to be unable to pay or secure the liabilities so assumed. He made a statement of his affairs to the Defendant, who proposed the following arrangement, with a view of postponing the claims of the creditors: that Osborn should execute a bill of sale to him of the property and credits of the late firm; that the Defendant should redeliver the accounts and notes to Osborn for collection; that the latter should go on manufacturing until the property and credits were converted into money; that, with the avails, Osborn

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should *be at liberty* to pay up the liabilities of the late firm, on such terms as he could obtain; that the excess of the avails, beyond the amount required for that purpose, Osborn should invest as his share in a proposed partnership between him and the Defendant, in the milling and lumber business; that, except for the purpose of postponing the creditors of the late firm, its assets were to remain the property of Osborn, and the business of manufacturing should be continued at his expense, and for his benefit, though in the name of the Defendant.

Osborn acceded to this arrangement, and in pursuance of it the Defendant received a bill of sale, and took possession of the assets of the late firm, inventoried at $4,400, together with individual notes and accounts, due to Osborn, amounting to about $240.

In violation of this understanding and agreement, the Defendant unjustly refused to deliver up to Osborn the notes and accounts which belong to him, and has unlawfully converted them to his own use.

On the 15th of October, 1858, the Plaintiff obtained a judgment against Osborn, by confession, for $2,209.93, being the amount of the company's demands against George Clow & Co.

On the 25th of the same month, an execution was issued to the sheriff of Cayuga, the county in which Osborn resided, and he collected thereon the sum of $175.64; and the balance still remains due from Osborn, Clow & Co. He and they are bankrupt, and unable to pay any portion of the claim.

The Defendant has the property transferred to him, or its proceeds, and refuses to pay anything, either to Osborn or his creditors.

The complaint concludes with a demand that the Defendant be required to render an account of the property and its proceeds, and to deliver the same over to a receiver, to the end that it may be applied in payment of the debts due to the creditors of the late firm of George Clow & Co.

Finlay M. King for Appellant.
Amasa J. Parker for Respondent.

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PORTER, J.—The referee was right in holding that upon the facts alleged the Defendant was entitled to judgment. The Plaintiff was not in a position to affirm and enforce a contract, which was not made for his benefit, and to which he was neither party nor privy. It does not appear that he succeeded in any way to the right of Osborn, and he cannot assert the claim of the latter to redress for the wrongs he imputes to the Defendant. He does not demand a judgment declaring the invalidity of the transfer from Osborn to Foster, nor does he allege a state of facts entitling him to that relief. His remedy at law is not exhausted, and his execution is unreturned. The complaint cannot be sustained on the footing of a creditor's bill; and, assuming all its allegations to be true, no cause of action results in favor of the Plaintiff. He is not relieved by the alleged insolvency of the debtor from the necessity of complying with the condition of the statute, if he would impeach the transfer as fraudulent (Crippin *v.* Hudson, 13 New York, 165; Dunlevy *v.* Tallmadge, 32 id. 461).

A reversal is claimed on the further ground that the costs awarded at Special Term are embraced in the record of judgment. An affirmance at the General Term was clearly improper, but the correction should be made on motion in the Court below, after the record is remitted.

The judgment should be affirmed, with costs. Judge BOCKES also read an opinion for affirmance.

All the judges concurring,

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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THOMAS FIELDEN ET AL., APPELLANTS, v. PIERRE FRANÇOIS LAHENS ET AL., RESPONDENTS.

Note, Accommodation — Authority of Partner to make or endorse — Notice. Code, §§ 136, 274.

As it is no part of the business of a mercantile firm to make or endorse notes for third persons, there is no implied authority for an individual member of such firm to make or endorse such paper in the firm name. Consequently the holder of such paper, with notice that it was made or endorsed for purpose of accommodation merely, without the consent of the firm, cannot recover upon it.

Where the maker of a note, endorsed by a firm, presents the same to be discounted for his accommodation, such fact shows upon its face that it is a mere accommodation endorsement.

PARKER, J.—This action was commenced in the Superior Court of the City of New York, on the 21st of October, 1844, against the Defendants, as alleged endorsers of three promissory notes, all dated May 25th, 1844, two of them payable at ninety days, and one at sixty days from date; one for $14,000, one for $13,500, and the third for $21,221.43, making in all $48,721.43. They were in the common form, signed by Alexander Caselli, as maker, and endorsed with the name of J. Lahens, &c.

The Defendant, Louis Emile Lahens, appeared by one attorney, and the Defendants, Pierre François Lahens and Edward Ernest Lahens, by another, and put in separate pleas of the general issue, and the cause was referred to three referees, who, upon the trial, which commenced February 4, 1858, nonsuited the Plaintiffs.

The referees found as follows:

First. That at the time of the making of and endorsing of the promissory notes in the declaration in this action set forth, Joshua Fielden, John Fielden, James Fielden, Thomas Fielden, Daniel Campbell, and William C. Pickersgill were copartners in trade under the respective firms of Fielden Brothers & Co., at the city of Liverpool, in England, and of W. C. Pickersgill & Co., at the city of New York; that the said Joshua Fielden, John Fielden, and James Fielden have since departed this life, and that the said Thomas Fielden, Daniel Campbell, and W. C. Pickersgill have

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survived them; also, that at the time of the making and endorsing of the said promissory notes, Pierre François Lahens, Edward Ernest Lahens, Edward Gaudard, and Louis Emile Lahens were copartners in mercantile business at Havre, in France, and at the city of New York, respectively, under the firm of J. Lahens & Co.; that the said Louis Emile Lahens was the only one of said copartners then residing in the city of New York, or in the United States; that the said Edward Gaudard has since departed this life, and that the Defendants in this action have survived him.

Second. That the endorsements of the name of J. Lahens & Co. upon the said promissory notes were made and executed in the city of New York by the Defendant, Louis Emile Lahens, one of the members of said firm, and delivered by him to Alexander Caselli, the maker of the said notes, in said city, for the accommodation of said Alexander Caselli, and that no consideration was received by the said J. Lahens & Co. for the same.

Third. That the notes so endorsed were delivered by the said Alexander Caselli, the maker thereof, to the said firm of W. C. Pickersgill & Co. at said city of New York.

Fourth. That the said W. C. Pickersgill & Co., by the fact of such possession and delivery of the said notes to them by the maker thereof, after the same had been so endorsed with the name of said J. Lahens & Co., had notice that the said J. Lahens & Co. had received no value therefor, and that the said endorsements were made for the benefit and accommodation of the maker of the said notes.

Fifth. That the Plaintiffs had failed to prove a joint liability of the Defendants, and further report that, upon the said facts so found, as a conclusion of law, the Plaintiffs, having so failed to prove a joint liability of all the Defendants, cannot recover in this action against the said Defendants, or against any or either of them.

And we do therefore decide and determine that all the Defendants are entitled to judgment against the Plaintiffs, and for their costs.

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Court of New York was correct, and should be affirmed, with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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GEORGE FARNHAM ET AL., RESPONDENTS, v. WILLIAM M. MALLERY, APPELLANT.

Executors can enforce Bond to pay Mortgage on Testator's Real Estate.

Where a party has, for a good and sufficient consideration, given his bond to executors, that certain parties who are legally bound to do so shall pay and discharge a mortgage upon the real estate of their testator, he cannot, on breach of the condition of his bond and suit commenced thereon, object to the capacity of such executors to sue on such bond.

The form of the judgment against such obligee should be, that he pay and cause to be cancelled of record, the mortgage, within a time specified, and in default, that he pay the amount due, &c.

George T. Spencer for Appellant.
J. U. Dininny for Respondents.

DAVIES, CH.J.—The Plaintiffs' claim in this action is based upon a guarantee of a bond made by Laurence Mallery and Hiram W. Bostwick to the Plaintiffs, in these words:

"Know all men by these presents that we, Laurence Mallery and Hiram W. Bostwick, of Corning, Steuben county, New York, are held and firmly bonded unto George Farnham and Henry Womburgh, both of Addison, Steuben county, New York, executors of the last will and testament of William Womburgh, deceased, late of Addison, in said county of Steuben, in the sum of seven thousand dollars, lawful money of the United States of America, to be paid to the said George Farnham and Henry Womburgh, executors, as aforesaid, the survivors or survivor, or his or their assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated 26th day of June, in the year 1834.

"The condition of this obligation is such, that if the above bounden Laurence Mallery and Hiram W. Bostwick, their heirs, executors, or administrators, shall well and truly pay and satisfy of record, or cause to be fully paid and satisfied of record, and

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fully discharge a certain indenture of mortgage made and executed on the sixth day of September, 1831, by Robert Miller to Isaac Bronson, then of the city of New York, to secure the payment of the sum of three thousand five hundred dollars and interest, which mortgage is on the lands conveyed to said William Womburgh, now deceased, by the said Laurence Mallery and his wife, by deed bearing date the 26th day of January, in the year 1847, which lands are situated in the town of Big Flatts, Chemung county, New York, and which mortgage is duly recorded in Chemung county clerk's office, and which is to be paid, satisfied, and discharged by the above-bounden Laurence Mallery and Hiram W. Bostwick, as follows, viz.:

"One thousand dollars and all of the interest on said $3,500 due on the first day of July, 1855, and all that shall remain unpaid, after making the said payment, on the first day of July, 1855, as aforesaid, of the said sum of $3,500, together with all the interest thereon, shall be fully paid on the first day of July, 1856, and the mortgage shall be fully satisfied and discharged on the same first day of July, 1856, so that it shall be no longer a lien or encumbrance on said lands, nor of any force or effect, without fraud or delay, then the preceding obligation to be void, otherwise to remain in full force and virtue."

The Defendant, William M. Mallery, on the 26th day of June, 1854, did make, execute, and deliver to the Plaintiffs, as executors, as aforesaid, his written guarantee of said bond or obligation, and which was annexed to said bond, and is in these words:

"For and in consideration of the sum of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I do hereby become surety for the punctual payment of all moneys, and full performance of all of the conditions and covenants in the annexed bond mentioned, to be paid, done, and performed by Laurence Mallery and Hiram W. Bostwick, and if any default shall be made by them, or if they shall refuse or neglect to fully pay or fulfil all or any of the payments, or perform all or any of the conditions mentioned in said bond, at any time, I hereby agree to pay and fully satisfy and discharge the mortgage men-

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tioned in said bond, and fully perform in every respect all of the agreements and conditions mentioned in said bond, and at and within the time therein stated."

The complaint averred that on or about the 26th day of January, 1847, the said Laurence Mallery sold and conveyed to the said William Womburgh, by a warranty deed of that date, certain pieces and parcels of land therein described. That before said sale and conveyance, to wit, on or about the 6th day of September, 1831, one Robert Miller, who was at that time the owner of said lands, executed and delivered to Isaac Bronson a mortgage upon said lands to secure the payment to said Bronson of the sum of $3,500, which mortgage was, at the time of the sale and conveyance aforesaid, a subsisting and valid lien and incumbrance upon the said land. That said Laurence Mallery, at the time of the sale and conveyance aforesaid, promised and agreed with the said William Womburgh that he would, within six months thereafter, pay, satisfy, and cause to be discharged of record the said mortgage.

That in consideration of the sale and conveyance aforesaid, and the promise or agreement aforesaid, made by the said Laurence Mallery to pay, satisfy, and discharge of record as aforesaid the said mortgage, the said William Womburgh paid to the said Laurence Mallery about the sum of $11,000. That the said William Womburgh died on or about the 21st day of May, 1853, leaving a will, wherein and whereby he appointed these Plaintiffs executors of his last will and testament, who did, before the making of the said bond or writing obligatory, by said Laurence Mallery and Bostwick, above set forth, duly qualify and enter upon the discharge of the duties of executors of said last will and testament. That the said Laurence Mallery had neglected to pay, satisfy, or discharge the mortgage aforesaid, and that the same still remained a valid and subsisting lien and incumbrance upon the lands aforesaid, at the time of the making of the said bond or writing obligatory. The complaint further averred that said Laurence Mallery and Bostwick, for the purpose of securing to these executors, as aforesaid, the payment, satisfaction, and discharge of the mortgage

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aforesaid, which still remained a lien and incumbrance aforesaid, and for a valuable consideration, made, executed, and delivered to said Plaintiffs said bond or writing obligatory. The complaint also averred, that for the purpose of securing the punctual payment of all the moneys, and the performance of all the conditions and covenants mentioned in said bond, by said Laurence Mallery and Bostwick, the said Defendant made, executed, and delivered to them the written guarantee therein set forth, and which has been already described.

The said complaint further averred that the said Laurence Mallery and said Bostwick had not, nor had either of them, paid, or caused to be paid, or satisfied of record, the said mortgage, or any part thereof; nor had the said Defendant Mallery paid, or caused to be paid, or satisfied of record the mortgage aforesaid, although often requested so to do, but that the same still remained a valid and subsisting lien and incumbrance upon the land aforesaid.

Wherefore the Plaintiffs demanded judgment that the Defendant pay and satisfy, or cause to be paid and satisfied of record, the mortgage aforesaid, or that he be adjudged to pay the Plaintiffs the sum of $7,000, or so much as may be sufficient to pay and satisfy of record the mortgage aforesaid, or such other relief and judgment as the Court should see fit to grant.

To this complaint the Defendant demurred, and assigned the following causes of demurrer.

1. That it does not appear by the complaint that the Plaintiffs have legal capacity to sue as executors.

2. That there is a defect of parties in this, that the said Isaac Bronson is a necessary party, and is not made a party Plaintiff herein.

3. That there is a defect of parties, in that the said Robert Miller is a necessary and proper party, and is not made a party Defendant herein.

4. That there is a defect of parties, in that the said Laurence Mallery is a necessary and proper party Defendant, and is not made a party Defendant herein.

5. That there is a defect of parties, in that said Bostwick is a

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necessary and proper party Defendant, and is not made a party Defendant herein.

6. That said complaint does not state facts sufficient to constitute a cause of action.

7. That it appears by the said complaints that the Plaintiffs are not entitled to the relief therein demanded.

8. That it does not appear in or by said complaint that letters testamentary or of administration have been issued to the Plaintiffs, or at what time, or by what Court or authority.

9. That it does not appear in or by said complaint that the Plaintiffs, at the time of the commencement of the action, or at any other time, had any estate or interest in the lands upon which said mortgage was a lien or incumbrance, or that the Plaintiffs were in any way injured or prejudiced by the existence of said lien or incumbrance.

10. That it does not appear in or by said complaint that the Defendant has had any notice of any breach of any of the conditions of the bond set forth in the complaint, of the refusal or neglect of the obligors therein to pay or fulfil all or any of the payments, or perform all or any of the conditions mentioned in said bond.

11. There is no sufficient breach of any of the conditions of said bond set forth in the complaint alleged therein.

12. There is no sufficient breach of the agreement of the Defendant stated or alleged in said complaint.

Judgment was given for the Plaintiffs, overruling said demurrer at Special Term, unless the Defendant, within thirty days, should answer on payment of costs. Said order, on appeal, was affirmed at General Term.

The cause coming on again to be heard at Special Term, judgment was again rendered for Plaintiffs for the amount then due upon the said bond and mortgage, amounting to the sum of $3,686.47, and the costs of this action. And, upon appeal to the General Term, said judgment was affirmed, and the Defendant now appeals to this Court.

The Supreme Court correctly held that the grounds assigned

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in the demurrer interposed by the Defendant presented no obstacle to the Plaintiffs' recovery.

The engagement or contract of the Defendant with these Plaintiffs was absolute, that in the event Laurence Mallery and Bostwick should fail in the performance of their covenants, then the Defendant agreed to pay and fully satisfy and discharge the said mortgage to Isaac Bronson, and fully perform in every respect all the covenants and agreements contained in the bond of Laurence Mallery and Bostwick, on their part to be done and performed.

The prayer of the complaint was that the Defendant should pay and satisfy, or cause to be paid and satisfied, the said mortgage to Isaac Bronson, or should be adjudged to pay to the Plaintiffs a sum sufficient to pay and satisfy of record the said mortgage.

As already observed, the judgment of the Supreme Court is that the Defendant should pay absolutely to the Plaintiffs the amount of the said judgment. In this I incline to think that Court erred, and that the judgment should have been that the Defendant should pay and satisfy, or cause to be paid and satisfied of record, the said mortgage to Isaac Bronson, within thirty days from the date of said judgment, or, in the event of his not doing so, then that he pay to the Plaintiffs the amount of the said judgment.

With this modification, I am for the affirmance of the judgment, with costs.

BOCKES, J.—This is an appeal from a judgment of the Supreme Court, in favor of the Plaintiffs, on demurrer to the complaint.

The case made by the complaint is as follows: Laurence Mallery owned lands, on which there was a mortgage lien of $3,500.

He sold and conveyed the lands to William Womburgh, by warranty deed, and agreed with the latter to assume, pay off, and discharge the mortgage. Womburgh died, and the Plaintiffs were appointed his executors. For the purpose of securing performance of the agreement, to satisfy the mortgage, Mallery, with Hiram W. Bostwick as his surety, made a bond to Womburgh's executors, in the penal sum of $7,000, conditioned that they would

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satisfy and discharge the mortgage by instalments—the last one to be paid on the 1st July, 1856.

The Defendant, thereupon, and by a separate instrument, under seal, became surety for Mallery and Bostwick, and agreed that in case they should neglect or refuse to fulfil the condition of the bond, he would perform it according to its terms.

All the parties having omitted performance of the condition, this action was instituted to enforce the Defendant's obligation.

The facts above recited are all alleged in the complaint, and very manifestly show a good cause of action.

The case, briefly stated, is this: The Defendant covenanted and agreed with the Plaintiffs that Mallery and Bostwick should satisfy and discharge the mortgage. They omitted so to do, as did also the Defendant; the latter was, consequently, in default on his agreement.

The Supreme Court was very clearly right in giving judgment for the Plaintiffs on the demurrer.

Nor was the complaint open to any technical or formal objection as a pleading.

The Plaintiffs were authorized to maintain the action as executors. It is averred that William Womburgh was dead, and that they had been duly appointed the executors of his will and testament; and it also appears that the bond and instrument of suretyship were made to them as such executors. The Defendant, having made the agreement with them as executors, is estopped from denying their right to bring the action in their representative capacity; and it must be assumed, too, that they have an interest in the enforcement of the agreement. The Defendant, by his agreement, was under personal engagement to them as executors; and having broken his covenant with them, they could enforce his liability.

The only difficulty in the case is in the form of the judgment.

The judgment, as entered, is absolute—that the Plaintiffs recover the amount remaining unpaid on the mortgage, to wit, $3,686.47, with interest from October 4, 1858.

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There is no security that the Plaintiffs will appropriate the recovery to the payment of the mortgage debt.

If collected by them, they may refuse, or become unable to satisfy the debt with the money, and leave the bond to be enforced against the obligor.

There should be a provision in the judgment to meet this contingency.

If the executors had, in fact, paid off the debt and satisfied the lien, there would then be no difficulty; their recovery should then be absolute for the amount paid.

But this they have not done. They have yet suffered no damage, and the action is brought with a view to protect them (and those interested through them in having the agreement fulfilled) from injury.

The action is for a specific performance of personal covenants —a specific performance of an agreement of indemnity.

There was no difficulty, consequently, in so framing the judgment or decree as to meet the requirements of the case, and protect the rights of all interested in the subject-matter of the action, although not parties.

The judgment should have been to the effect that the Defendant specifically perform his covenant and agreement, by satisfying and discharging the mortgage within a time to be specified, or, in default thereof, the Plaintiffs recover judgment against him for the sum remaining unpaid on the mortgage; that judgment be forthwith docketed against him for such amount, to stand as security and to be enforced by execution, in case of his neglect to satisfy and discharge the mortgage within the time specified; that, in case of sale or collection under execution, the sheriff bring the amount collected into Court to abide its order, and that the Plaintiffs be at liberty to apply to the Court for further relief, if necessary. Also, that the Plaintiffs recover the costs and disbursements of the action.

This, in my judgment, should have been the form of the decree.

I am therefore of the opinion that the judgment of the Supreme Court in favor of the Plaintiffs, on the demurrer to the complaint,

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should be affirmed, with costs, but with a modification of the details in accordance with the above suggestions. And in my judgment the Defendant should be charged with the costs on the appeal to this Court. The litigation is without excuse on his part.

His agreement was clear and specific, and, for aught that appears, was fairly and understandingly entered into.

It should have been faithfully performed.

The modification now suggested is formal merely, and is to meet a contingency which may arise in case of justification by him in his unfaithfulness. He should therefore reap no benefit from it.

The judgment against him is in effect affirmed; and it should, as I think, be with costs of appeal.

On consultation, the judgment was modified in accordance with opinion of DAVIES, Ch.J.

JOEL TIFFANY,
State Reporter.

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NATHANIEL HAYWARD, APPELLANT, v. THE LIVERPOOL AND LONDON FIRE AND LIFE INSURANCE COMPANY, RESPONDENTS.

Insurance—Loss by Fire occasioned by Explosion—Steam-engine.

In a policy of insurance upon a building in which there is a steam-engine, a clause exempting the company from liability, when the loss by fire is occasioned by any explosion, must be construed as applicable to an explosion of the engine within the building, as well as to the explosions of any kind without the building; and the fact that an extra premium was paid on account of the increased risk from the engine within the building does not change the construction.

PARKER, J.—The provision in the policy, that the company will not be liable to make good any loss or damage by fire, which shall happen or arise by any explosion, repeated in the conditions appended, and referred to in the policy, must, I think, be taken to include an explosion of the steam-engine insured, as well as any external explosion.

There is no inconsistency in such construction with the fact that the engine itself was insured against fire. The company might well say: We will insure your factory, engine included, against fire produced from every cause, except an explosion of the engine. So far from there being any inconsistency in this, it is impossible to say that it was not a wise and reasonable provision, intended to induce carefulness in the management of the engine, and to refuse the risk of carelessness in its use. It is said the Defendant has been paid an extra price for the risk caused by the engine. Still, the exception in the risk of its explosion is not inconsistent with that fact. Undoubtedly the use of a steam-engine, and without respect to its liability to explode, increases the hazard of loss by fire to a building in various ways, which sufficiently accounts for the extra charge for insurance, where one is used. In the case of Harper v. The Albany Mutual Ins. Co. (17 N. Y. R. 194), relied upon by the Defendants, the doctrine affirmed was, that in construing a policy of insurance, the intent

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of the parties is to be gathered from both the written and printed portions, and effect given to both, so far as can be; but in case of repugnancy between them, the written part shall prevail over the printed part; and the principle was illustrated by the learned judge who gave the opinion of the Court, in the following manner: "When the insurance is directly upon the stock in trade, as, for example, in the business of manufacturing and sale of camphene, to hold that a general printed prohibition (contained in every policy of insurance) against keeping or using it, unless permission be specially given and endorsed upon the policy, would have the effect to nullify its direct and positive stipulations, would be preposterous."

The case at bar is very different from that of Harper v. The Albany Mutual Insurance Co.; and as we have seen that there is no repugnancy between the insurance of the engine against loss by fire and the exception of loss and damage by fire occasioned by the explosion of the engine, it is not within the principle of that case.

The inquiry always is, is there between the exception and the scope of the undertaking in the policy any repugnancy? If not, in construing the policy the intent of the parties is to be gathered from both the written and printed portions, and effect given to both, according to the ordinary rules of construing written contents.

I am of the opinion that the judgment of the Supreme Court is right, and should be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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JOHN McCLELLAND, RESPONDENT, v. GEORGE REMSEN, SHERIFF OF KINGS COUNTY, APPELLANT.

Partnership—Any Partner may secure Creditor.

Either member of a firm has a right to secure a creditor thereof by a transfer of partnership property, or to give a chattel mortgage for that purpose.

APPEAL from Supreme Court. The action was for trespass in seizing goods of the Plaintiff. The Defendant claimed to justify under a judgment and execution in favor of William F. Howe, against William McClelland and Elizabeth Hasluck, alleging the property seized belonged to one or both of the Defendants in the execution.

The cause was tried at the Kings Circuit, before Mr. Justice Lott, and resulted in a verdict for the Plaintiff of $394.55.

It appeared on the trial that, on the 1st of February, 1860, or prior thereto, Elizabeth Hasluck, a married woman, formed a partnership with William McClelland, in the liquor business, in Brooklyn, and that they conducted it in the firm-name of William McClelland & Co. On the 2d of June, 1860, they were indebted to the Plaintiff, John McClelland, in the sum of $357, for liquor and cigars sold and delivered to the firm.

On that day William McClelland, in the name of the firm, executed an instrument transferring to John McClelland the goods and other property of the firm, upon the trust that he should convert the same into cash, and, after satisfying this debt of $357, with interest, and the charges and expenses incident to the assignment, should pay over the balance of the net proceeds to the firm. Attached to the instrument was the bill, the payment of which it was intended to secure. Some weeks afterward, the bill remaining unpaid, the Plaintiff went to the store, demanded and received possession of the goods, and locked them up. Subsequently, an execution was delivered to the Defendant, who seized the property as that of the assignors. The judgment under which it was issued was confessed by Mrs. Hasluck, and she assumed to confess it for McClelland as well as herself.

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The judge held that the assignor was not justified, and directed a verdict for the Plaintiff, to which the Defendant excepted.

This decision was sustained at General Term, in the Second Judicial District, and the Defendant appealed to this Court.

N. F. Waring for Appellant.

James Troy for Respondent.

PORTER, J.—It was the right of either member of the firm to secure the Plaintiff, as one of its creditors, by a transfer of partnership property (Mabbett *v.* White, 2 Kernan, 443; Graser *v.* Stellwagen, 25 N. Y. 315).

The assignment, in this instance, was in the nature of a mortgage. It did not divest the entire title, but left a residuary interest in the assignors, which could be reached by their other creditors. Its primary purpose was to secure the payment of the debt, and the trust to account for the surplus was purely incidental. Such a trust is not within the condemnation of the statute, and such a reservation is not unlawful (Leitch *v.* Hollister, 4 Comstock, 211; Curtis *v.* Leavitt, 15 New York, 141; Dunham *v.* Whitehead, 21 id. 131.)

The judgment of the Supreme Court should be affirmed.

GROVER, J.—No grounds were stated upon which the motion for nonsuit was made. Hence no question arising upon that motion can be entertained in this Court. Nothing was lost by the omission, as the only possible grounds were, that one partner could not dispose of the entire stock of the firm to secure or pay a debt; and that the transfer to the Plaintiff was fraudulent and void on its face.

The first of these questions was decided by this Court against the Defendant in Mabbett *v.* White (2 Kern. 443), and the last in Leitch *v.* Hollister et al. (4 Com. 211).

All the judges concurring.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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CHARLES FREDERICK RUSSELL, APPELLANT, v. WILLIAM H. RUSSELL AND OTHERS, RESPONDENTS.

Will—Executor—Trustee—Power to sell Real Estate.

Where the testator bequeathed and devised all his estate to his wife during her life, or widowhood, with remainder to his four children, and afterwards by codicil authorized his wife to sell and dispose of his real and personal estate, or any part of it, as she should deem most expedient for the best interest of all his legatees, held, that this did not authorize her to deed certain real estate to one of the children, in payment of a debt due him from the estate.

LABAN RUSSELL, the father of the Plaintiff, and of the Defendants William H. Russell, Mary Ann Jewett, and Laban G. Russell, departed this life in the month of September, 1842, seized and possessed of real estate in the town of Rye, in Westchester county.

He had previously made a will, dated 18th April, 1833, by which he gave all his estate to his wife during her life or widowhood, with remainder to his said children, and, in case of the death of either, to his or her issue, and appointed his wife and his son, William H. Russell, executors.

Subsequently, and on the 6th of September, 1842, he made a codicil to his will, by which he gave the following direction: "I do hereby will and direct that my said beloved wife Mary, my executrix in my said last will and testament named, shall have full power and sole authority, at any and at all times, in her discretion, to sell and dispose of my said real and personal estate, or any part thereof, at public or private sale, as she shall deem most expedient and for the best interest of all my legatees in my said last will and testament named, giving and granting my said executrix full power to convey the same, by deed or otherwise, as she may be advised is most effectual and correct to vest the title to the same in the purchaser or purchasers thereof."

The said will and codicil were proved before the surrogate of Westchester county on the 14th day of November, 1842, and letters testamentary thereon were on the same day granted to Mary

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Russell alone, who, thereupon, assumed the execution of said will and codicil.

On the 9th of March, 1843, the said Mary Russell made and executed a deed to her son William H. Russell, who, at that time, although named as executor with her in the will, had not qualified or acted as such, by which she conveyed to him a piece of the land at Rye, of which the testator died seized, containing fifteen acres of land, more or less.

The consideration expressed in the deed was $3,000, and consisted, as found by the Justice who tried the issues in the action, "of moneys to that (and a greater) amount due to the said William H. Russell from the said testator at the time of his decease, which remained unpaid at the time of the execution of the said deed, and the claims for which have not been barred under the Statute of Limitations, and was applied, by mutual consent, in satisfaction of such consideration."

William H. Russell qualified as executor on the 6th day of October, 1862.

The testator left personal property to the amount of $3,800, real estate to the value of $15,000, and no debts except that to William H. Russell, the Defendant.

The said Mary Russell departed this life on the 22d day of April, 1855, and in October, 1857, this action was commenced by the Plaintiff, one of the heirs and devisees of the said Laban G. Russell, for the purpose of setting aside the above-mentioned deed and the subsequent conveyances.

The said William H. Russell and his wife, and the other heirs and devisees of the said Laban G. Russell, together with Joseph Dean, in whom the title to the premises had been vested, and who subsequently reconveyed to the said William H. Russell, who is now the owner thereof, are made parties Defendant.

The Justice at Special Term dismissed the complaint; the Supreme Court, at General Term, affirmed the judgment thereon, and the Plaintiff now appeals to this Court.

Jesse C. Smith for Appellant.

Henry C. Murphy for Respondent.

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HUNT, J.—By his will, executed April 18th, 1833, the testator gave all his real and personal estate to his wife, during her life or widowhood, with remainder to his four children, and named his wife and his son William as executors.

By a codicil of September, 1842, the testator gave power to his wife, Mary Russell, "to sell and dispose of my real estate, or any part thereof, at public or private sale, as she shall deem most expedient, and for the best interest of all my said legatees, in my said will named."

By the expression "legatees," in the codicil, the testator intended to designate his four children whom he had named in the body of the will as those to whom he "devised and bequeathed" the residue and remainder of his estate, real and personal, after the death of his wife. In the execution of this power of sale the widow had no interest.

It was to be executed as she should deem expedient, not for her own benefit or advantage, but for the best interest of those entitled to the estate after her death, viz.: the testator's four children, described by him as his legatees. The income only belonged to her, and the corpus of the estate belonged to the children exclusively.

It was a general power in trust in the widow (1 R. S. 732, §§ 77, 79, 94, 106).

Was the power well executed by the conveyance of a portion of the testator's real estate to one of his sons, in satisfaction of a debt due to him from the testator? The executrix had no power or control over the real estate in her character of executrix.

There was personal property enough for the payment of the testator's debts, without calling upon his real estate, and the real estate was not liable to that purpose until the personal had been exhausted.

It was not liable at any time, except upon the presentation of a petition to the surrogate, alleging the insufficiency of the personal estate, and asking the application of the real estate to that purpose.

Of such an application all parties interested in the real estate

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would be entitled to notice, and they would have the right to litigate the proceeding. No such proceeding was had in the present case.

This circumstance is important here in a double respect. It shows, in the first place, that the transaction is to be sustained solely upon the ground of the execution by the widow of a power in trust; and secondly, it relieves the case from the question of the effect of a conveyance by one co-executor or co-trustee to his associate. William H. Russell was not a co-executor at the time of the conveyance to him, in so far as he had not then quali fied. He was not a co-trustee in any event, as the power in trust was given to Mrs. Russell exclusively.

The authority to Mrs. Russell to sell was in its terms general, unrestricted as to time, place, or circumstance. It required, however, that the transaction should be a sale, and it must be based upon her conviction that such sale was for the best interest of all the legatees named in the will.

In my opinion she had no power under this clause to convey, in settlement of a claim against the testator's estate, or in payment of a debt conceded to be due from him.

The duty of the payment of debts belonged to the executor; and, as already stated, real estate could not be applied to that purpose, except upon certain contingencies not existing in the present case.

The judge, however, finds specifically that the conveyance was made in satisfaction of a debt due from the testator to William H. Russell, and was applied to that purpose by mutual consent. By this is meant, I suppose, a mutual arrangement between the trustee and William H. Russell, and not by an arrangement with the parties here litigating.

I think this was not a good execution of this power; and that, having knowledge of the trust, no title passed to William H. Russell by the deed of March 9, 1853, from his mother (1 R. S. 730, § 65).

In the case of Allen v. Dewitt (3 Coms. 276), the executor of Simeon Dewitt was empowered to sell in this language: "I em-

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power my executors to sell all my estate, both real and personal, not specially bequeathed or devised, in such parcels, at such times, and for such considerations as they shall judge proper, for the purpose of discharging my debts, and creating funds for the support of my family, and on such sales to give the proper legal conveyances. After my debts shall have been paid, the avails of my property shall be equally divided among all my children."

Before the testator's debts were paid, the husband of one of the daughters procured from the executors a conveyance of certain lots, and mortgaged them to the Plaintiff in that suit.

Nothing was paid for the land; but the husband agreed to protect the estate against the mortgage, or, in default thereof, that the value of the land might be charged against his wife's distributive share in the estate.

On a bill filed to foreclose the mortgage, given by the husband and wife pursuant to this arrangement, it was held that the conveyance was not an execution of the power contained in the will, and passed no title. The sale was sought to be supported on the argument that it was, in effect, a division of the avails of the estate, and a setting apart of this parcel to the wife in satisfaction of her claim as one of the children of the testator. It was held, however, first, that a division was only authorized after the payment of debts, while this conveyance was made before the debts were paid; and secondly, that the power required an absolute sale for a fixed consideration, which should form a fund for the maintenance of the family, and for ultimate division. In Briggs v. Davis (20 N. Y. R. 15) the grantees of land in trust for the payment of debts reconveyed to the grantor, reciting that the trusts had been executed. The debtor then mortgaged the land to one having no actual notice of the trust. It was held that the reconveyance, being in contravention of the trust, was void, and that the legal estate remained in the trustees.

In Roome v. Philips (27 N. Y. R. 357) the will directed the executor to sell and convey the real estate "upon such terms as he may think proper, and most beneficial to his estate."

It was held that this did not authorize a conveyance in fulfil-

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ment of a contract made by the testator in his lifetime. The Court says: "The manner and terms of sale had been fixed by the testator before the will took effect by his death. The power does not look to the conveyance of the naked title to lands of the beneficial interest in which the testator had divested himself in his lifetime."

So stringent is the rule on this subject, that even legislative action cannot avoid its effect.

Thus, in Powers v. Bergen (2 Seld. 359), lands had been devised to trustees for the use of the testator's daughter for life, with remainder to her issue living at her decease, and, for want of such issue, to all her grandchildren.

During the life of the daughter (she having children living) a statute was passed authorizing the trustees to sell the land, pay certain expenses and liens, and invest the surplus in securities to be held in trust as the lands were held under the will.

It was held that the act was beyond the power of the legislature, and that the trustees could give no title to lands sold in pursuance of it. (See Smith v. Bowen, 35 N. Y. R. 83; see also the cases of Waldron v. McComb, 1 Hill, 111, and S. C. 7 Hill, 335, arising upon the will of Medcef Eden.)

I do not think that the fact that the debt is a valid one is an answer to the difficulties suggested. Whatever doubt there might have been as to its validity is removed by the finding of the Judge, and I assume the existence of a valid debt. I have endeavored to show that the discharge of such an obligation belonged to the executor, and was no part of the duty of the trustee. Neither is it an answer to place the case upon the ground assumed below, that the widow, having acknowledged the receipt of $3,000 for this land, has rendered herself chargeable as executrix to that amount; and, having paid the same amount in discharge of a valid debt, no injustice would be committed by allowing the deed to stand. This is a short cut toward justice which tramples upon the principles of law, and confounds the distinction between a question of power and one of convenience.

If the view I have taken be sound, the trustee had no power to

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make the conveyance; and the fact that she is ready, as executrix, to account for the money received, has no relevancy to the subject.

No title passed by the attempted execution of a power, and the estate descended to the remaindermen unaffected by her act.

I think the judgment should be reversed, and a new trial be ordered.

All concur, except DAVIES, Ch.J., and GROVER, J.

JOEL TIFFANY,
State Reporter.

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SAMUEL THOMAS, RESPONDENT, v. HORACE HUNT AND ANDREW KINGSLEY, APPELLANTS.

Contract, Written, cannot be varied by Parol Evidence.

A written agreement between parties must be regarded as containing the whole of their agreement upon the subject-matter thereof, and as merging therein all prior and contemporaneous understandings. Therefore, evidence offering to establish other facts and conditions as part of the contract, which are not contained in the agreement, is inadmissible.

S. G. Hadley for Respondent.
P. Carter and *Scott Lord* for Appellants.

DAVIES, CH.J.—The Plaintiff in this action claims to recover the value of a quantity of stone delivered to the Defendants, under a contract made between the Plaintiff and his partner, Levi Reynolds, and the Defendants, dated January 25, 1855.

By this agreement the Plaintiff and his partner, parties of the first part, agreed to deliver to the Defendants, parties of the second part, at such points on the Erie Canal as said parties of the second part should designate, in sections 214 to 229, both inclusive, of the Erie Canal Enlargement, all the stone necessary and proper for building all the culverts on said sections on said canal, which had been let to the said parties of the second part by canal officers; "*said stone to be of the sizes and qualities such as the engineer in charge of the work on said section shall approve.*" Said stone to be delivered, as soon as they reasonably could be, after the opening of the navigation upon the canal in the spring then next ensuing. The contract contained other provisions not needful to recapitulate. The complaint averred performance of the contract on the part of the parties of the first part, and that a quantity of stone had been delivered under said contract, "which had been estimated and measured in the wall, by the engineer in charge of the said works, as mentioned in said

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contract," and that there was due therefor the sum of $3,455.14; and also due from the Defendants the sum of $90, for fifteen days' detention of the boats of the said parties of the first part, at the rate of $6 a day, as provided for in said contract. The complaint also averred that the interest of said Reynolds in said claims and demands had been assigned to the Plaintiff.

The answer of the Defendants contained:

1. A general denial of all the matters mentioned in the complaint, except as to the making of the contract.

2. That the Defendants had fully paid for all the stone delivered.

3. That the parties of the first part had not delivered all the stone called for by said contract, and that those delivered were not proper for the purpose specified, nor of the sizes or qualities required by said contract, nor were they delivered at the time contemplated by said contract; and the Defendants claimed they had suffered loss and damage by reason of the non-performance of said contract on the part of the said parties of the first part, to the amount of $2,400.

The action was referred to a referee, who found, as matter of fact, that the agreement, as set forth in the complaint, was made and entered into between the parties therein; that Reynolds, before the commencement of this action, had transferred all his interest in said agreement to this Plaintiff; that before such assignment Reynolds and the Plaintiff had partially performed the same on their part, and that since said assignment the said Plaintiff had continued the performance thereof.

That all the stone required by the said Defendants, under said agreement, were furnished to them by the said Reynolds and the Plaintiff, or by the Plaintiff alone, in accordance with, and in fulfilment of the contract, and were received by the Defendants; that said Reynolds and the Plaintiff furnished stone to the cutters of the Defendants, at the yard of the Plaintiff, as fast as the same were needed by the said cutters; that the Plaintiff and said Reynolds commenced to deliver said stone at the places designated by the Defendants, on the Erie Canal, after the open-

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ing of the canal in the year 1855, and so continued until the whole quantity were delivered, on or before the month of November in that year, in a reasonable time after said opening; and that there was then delivered $224\frac{31}{100}$ cubic yards of stone for arches, and $702\frac{73}{100}$ cubic yards of other stone; that the stone thus delivered amounted, at the price stipulated for in the contract, to the sum of $3,176.34; that the Defendants have paid therefor the sum of $2,307, and that there is still due and owing to the Plaintiff, from the Defendants, the sum of $869.34, with interest from the 20th of November, 1855. And he also found, as conclusions of law, that the Plaintiff and the said Reynolds, or the Plaintiff alone, had fully kept and performed the said agreement; that the Defendants had not fully kept and performed the same, and that they were indebted to the Plaintiff in the sum of $869.34, and interest thereon from the 20th of November, 1855.

Judgment was accordingly entered, upon the report of the said referee, for the Plaintiff, and on appeal the same was affirmed at the General Term. The Defendants now appeal to this Court.

Upon the facts found by the referee, no question can seriously be made that the Plaintiff was not entitled to the judgment which has been rendered in his favor. If no error has been committed by the referee before the trial, in the admission or rejection of evidence, no ground is presented to this Court for interference with the judgment appealed from.

But two exceptions were taken to the rulings of the referee, which are now urged before us as erroneous.

1. On the trial, the Defendants offered to show that at the time of making this contract a large quantity of good stone were lying in the yard of the Plaintiff, and near the quarry, and that such stone were shown to Defendants as samples of their stone, and that the stone furnished to be cut were of even inferior quality to those, and cost much more to dress them, and were not as suitable for the work.

Plaintiff objected to the introduction of this evidence, and the same was excluded, and the Defendants excepted.

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The ruling of the referee was clearly correct. The evidence was properly excluded for several reasons.

1. The written contract between the parties must be regarded as containing the whole of their agreement upon the subject-matter thereof, and as merging therein all prior and contemporaneous conversations, stipulations, and negotiations in relation thereto (Renard v. Lampson, 2 Kern. 561).

2. The testimony offered tended to contradict, alter, and vary the written contract between the parties. In the agreement it was stipulated that the size and quality of the stone were to be such as the engineer in charge of the work should approve. The offer was to show that the stone to be delivered was to be like a sample exhibited at the time of the execution of the contract, and that the stone delivered was of an inferior quality to the sample.

It was not competent for the Defendants thus, by parol, to alter, vary, or contradict the written contract.

3. The Defendants had set up no such ground of defence in their answer, and the testimony offered was not pertinent to any issue which they had raised by their answer.

No application was made to amend their answer in this particular, and under the answer and amended answer it was clearly irrelevant and immaterial.

The effect of the admission of the testimony offered was to substitute a new contract between the parties, and a new and different defence from that raised by the answers.

2. This question was put to one of the Defendants, a witness:

"How long would it have taken to build 218, if you had had the stone ready, as contemplated in the contract?"

To this question the Plaintiff objected, and the referee sustained the objection, and the Defendants excepted.

This testimony was sought to be elicited manifestly for the purpose of proving the amount of damage sustained by the Defendants, on the assumption that the stones were not furnished at the time provided for in the contract.

It assumed what had not appeared, and contrary to the fact

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found by the referee—namely, that all the stone called for by the contract was furnished by the Plaintiff and Reynolds, as required by it.

The exclusion of the question, upon this finding of facts, worked no injury to the Defendants, and presents therefore no ground for granting a new trial.

The judgment should therefore be affirmed, with costs.

All affirm.

JOEL TIFFANY,
State Reporter.

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DAVID C. FOSTER, APPELLANT, *v.* CORNELIUS VAN WYCK ET AL., ASSESSORS, &c., RESPONDENTS.

GEORGE VAN KLEECK, APPELLANT, *v.* FREDERICK WOODRUFF, COLLECTOR, &c., RESPONDENT.

CHARLES W. SWIFT, APPELLANT, *v.* THE CITY OF POUGHKEEPSIE, RESPONDENT.

Assessors, protected like all Judicial Officers.

It being the duty of assessors to ascertain and determine all taxable property, real or personal, within their town or ward, subject to taxation, they have jurisdiction to make the necessary investigation in respect to all property, and they are not liable for any errors they may commit in thus exercising the duties of their office. Their office, in this respect, is judicial, and in the discharge of its duties they are within the rule of protection extended to all judicial officers.

PARKER, J.—These are controversies submitted to the Supreme Court, without action, pursuant to section 372 of the Code.

The facts stated to the Court in the several submissions, which are substantially alike, show that the Plaintiffs are residents of the city of Poughkeepsie, and respectively owners of shares in three National Banks, organized under the act of Congress, approved June 3, 1864, and located in said city.

The assessors of that city, in the year 1865, assessed the Plaintiffs, respectively, for their shares in the said banks, at their par value. The Plaintiffs did not personally appear before the assessors, nor serve any claim or notice on them in reference to said assessment. The assessors made out an assessment roll in the form prescribed by statute, on which each of the Plaintiffs were assessed and taxed for other property; and at the close of the alphabetical list, and on a separate part of the roll, they inserted the names of the said National Banks, and the value of the real estate of each, and then, under the name of each bank so entered, they entered the names of the shareholders therein respectively, the numbers of the shares owned by each, and the par value

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thereof; and the Common Council imposed and extended the tax upon the real estate of each bank, and upon each shareholder for the value of his shares so entered.

The cashiers of the banks, before the completion of the roll, notified the assessors that such last-mentioned assessments were illegal, and demanded that they should be stricken from the roll. This was refused by the direction of the Common Council; a warrant was issued to the collector, under the seal of the city and the hand of the mayor, attached to the assessment roll, and with it delivered to the collector, commanding him to receive, levy, and collect from the several persons therein named the several taxes therein imposed.

Under this warrant, the collector, on the 7th of June, 1866, levied and collected the several taxes imposed on such bank shares of the Plaintiffs, respectively, for their goods and chattels, and did forthwith pay the same to the chamberlain of said city, who is, ex-officio, treasurer thereof.

On the part of the Plaintiffs it is claimed that the said assessments, and all proceedings based thereon, were without jurisdiction and void; and that the levy on their goods and chattels, in pursuance of said warrant, and by direction of said city, was a trespass, for which the Defendants respectively are liable to the Plaintiffs, in the amount so collected from them.

On the other hand, the Defendants claim that the assessors had jurisdiction in the premises, and admitted that the bank shares were exempt from taxation; that the Defendants, respectively, are not liable to any action by reason of said assessments, &c., but that the Plaintiffs, having omitted to institute legal proceedings to compel the correction of said assessment roll, by the Court or otherwise, are remediless in the premises.

The Supreme Court held that the Plaintiffs were neither of them entitled to recover, and gave judgment for the Defendants respectively to that effect, and for costs.

From the judgment thus given the Plaintiffs severally appeal to this Court.

The question in each case is, did the assessors have *jurisdiction*

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in respect to the assessments complained of? for it is not denied, on the one hand, that under the decision of the Supreme Court of the United States, in Van Allen v. The Assessors (3 Wallace, 573), the assessment was unauthorized, and would have been set aside upon due application to the Supreme Court, as not being in accordance with law; nor, on the other, that if the assessors had jurisdiction in the matter, and have erred only in its exercise, the only remedy of the Plaintiffs was such application to set it aside; and that no action for the irregularity would lie against any of the Defendants; except that in the case of Swift v. The City of Poughkeepsie, it is claimed by the Plaintiff that, even if the assessors had jurisdiction, so that they and the collector are not liable, still as the Plaintiff was not legally liable to taxation on his bank shares, the city, which has received the money collected from him to satisfy such illegal tax, is legally liable to refund it to him.

That the assessor had jurisdiction in the matter cannot, I think, be successfully disputed.

Taxation of all property is the general rule of the statute. It provides as follows: "All lands, and all personal estate within this State, whether owned by individuals or corporations, shall be liable to taxation, subject to the exemptions hereinafter specified" (1 R. S. 387, § 1, 1st ed). By the same statute (p. 390, § 8), it is made the duty of the assessors "to ascertain, by diligent inquiry, the names of all the taxable inhabitants in their towns or wards, and also all the taxable property, real or personal, within the same." It is not denied that the assessors had jurisdiction of the Plaintiffs, as taxable inhabitants of their towns or wards. As to the property in question, it falls within the description of property declared by the first section of the act above quoted to be liable to taxation. It is "personal estate," as the same is defined by the third section of the act, the term including "public stocks," and "stocks in moneyed corporations." It may also fall within one of the exemptions; but being property primâ facie liable to taxation, and the duty of the assessors being to ascertain all the taxable property, real and personal, within their town or ward, this property, held by residents of their town, presents itself to them

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for their decision whether it is taxable or exempt from taxation. That it shall turn out to be exempt from taxation does not exempt it from the scrutiny required of them by the statute, to ascertain whether or not it is taxable. Being personal property within their town or ward, it is within their jurisdiction as assessors; they have the right, and it is their duty, to examine the question whether it is liable to taxation, and this is a judicial inquiry (1 Kern. 593; 3 Denio, 117)—one, it may be remarked, in which the highest Courts have differed; and should they make a mistake, and hold it liable to taxation when it is not, surely they should not, for such mistake, be held liable as wrong-doers (Chegary v. Jenkins, 1 Seld. 376; Barhyte v. Shepherd, 35 N. Y. R. 238; Vail v. Owen, 19 Barb. 22; The Rochester White-Lead Co. v. The City of Rochester, 3 Coms. 463).

One of the classes of property expressly exempted by § 4 of the act from taxation is, "Every building erected for the use of a college, incorporated academy, or other seminary of learning." In Chegary v. Jenkins (supra), the building occupied by the Plaintiff as a young ladies' boarding and day school, was taxed, she claiming that it was exempt; and the collector levied on her property to collect the tax. Judge Ruggles, in his opinion, discussing the question of jurisdiction, says: "The assessors, in determining whether the Plaintiff's property was taxable as a dwelling, or exempt as a seminary of learning, acted judicially, and within the sphere of their duty. . . . Having the general authority to make assessments for taxation within the ward in which the Plaintiff's property was situated, they had jurisdiction of the subject-matter of the assessment in question." See also Henderson v. Brown (1 Caines' R. 92). Section 4 of the act in effect allows ministers of the gospel to hold property to the amount of $1,500 exempt from taxation. In Barhyte v. Shepherd (35 N. Y. R. 238), the Plaintiff, a minister of the gospel, sued the assessors for refusing to exempt him from taxation, although his real and personal estate were worth less than $1,500; and it was held that the assessors had jurisdiction to decide whether the Plaintiff's property was exempt or not; and in so deciding acted judicially, and

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were not liable for assessing the Plaintiff upon his property, even though it was exempt from taxation.

It cannot be said that the bank shares in these cases were any more absolutely exempt from taxation than "a building erected for the use of a seminary of learning," or the farm of a minister of the gospel, occupied by him, and of a value not exceeding $1,500. If the building on the farm turns out to be exempt, because found to be in the category of exemptions, it is as absolutely non-taxable as the bank shares in question; and yet the assessors are not liable for improperly including it in the assessment, because they are invested by the statute with authority to decide what property is taxable, and in so deciding act judicially.

It can make no difference, I apprehend, in regard to the assessors' jurisdiction, whether this immunity from taxation arises from state law or national law. In either case, the question of liability to taxation is to be determined by the assessors, and they have, of course, jurisdiction to decide it.

It is equally a judicial decision in either case, having equal protection from liability for having decided erroneously.

It is impossible to make any distinction, in respect to the subject under consideration, between the case at bar and the cases last cited; and, as was said by Judge Leonard in Barhyte *v.* Shepherd, after remarking upon the holding in Mygatt *v.* Washburn (15 N. Y. R. 316), that assessors have no jurisdiction to assess a non-resident for personal property: "It is not necessary to extend the application of the rule on any ground of public policy, that I can perceive, so as to include cases of mistake in deciding a claim to exemption, where the person and estate of the party are within the jurisdiction of the assessor."

The circumstance that the assessment of the bank shares was separate from the other personal property of the Plaintiffs, and specifically upon the shares, does not affect the question of jurisdiction. If the assessors, having jurisdiction of the subject-matter, and of the persons of the Plaintiffs, have failed to follow the directions of the statute in making up their roll, their action was irregular, and open to correction upon proper application to

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the Supreme Court; voidable, but not void (Easton v. Calendar, 11 Wend. 91, 95; Cunningham v. Bucklin, 8 Cow. 187; Wilson v. The Mayor, &c., of New York, 1 Denio, 595, 599; Butler v. Potter, 17 John. R. 145; and cases above cited). The rule is stated in Easton v. Calendar as follows: "Where the magistrate or officer has jurisdiction of the subject-matter, and errs only in the exercise of it, his acts are not void, but voidable, and the only remedy is by certiorari or writ of error."

In regard to the liability of the city of Poughkeepsie to refund the taxes paid into its treasury, and under the assessments in question, I am unable to see how it can be. The assessment was not void, but irregular or erroneous; and the only mode of avoiding such an assessment is by an application to the assessors, or by a proceeding in the Supreme Court to correct the errors or irregularities while the assessment stands unreversed; it is as effectual to protect not only those by whom it was made and executed, but all persons claiming under it, as a judgment of a Court having jurisdiction. It would be an error to hold that no liability attached to those who instituted and carried out the proceedings to compel the payment of the money by the Plaintiffs (there being no statutory protection), and yet that the individual or corporation who received it is legally liable to refund it.

The cases cited by the learned counsel for the Appellants, holding that "when a tax has been *illegally* assessed and collected, the money may be recovered back," are cases where there was, in the view of the Court, a want of jurisdiction. In Osborn v. Danvers (6 Pick. 89), it was held that when a taxable inhabitant is overrated by assessors, whether by including in the valuation property of which he is not the owner, or that *for which he is not liable to be taxed*, that does not render the assessment invalid or void, and his only remedy is by an application to the assessors, or the Court of Sessions, which is authorized to relieve in such cases, and not by an action for money had and received.

I am of the opinion that the judgment appealed from should be affirmed.

As to the case of Foster v. Van Wyck *et al.*, assessors, and Van

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Kleeck v. Woodruff, collector, all the judges concur in affirming the judgments.

As to the case of Swift v. The City of Poughkeepsie, a sufficient number of the judges to give a judgment failing to concur, a reargument in that case is ordered.

Judgment affirmed in the first and second cases, and reargument ordered in the third case.

JOEL TIFFANY,
State Reporter.

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AMELIA TRAVER, BY A. BULL, GUARDIAN, RESPONDENT, v. THE EIGHTH AVENUE R. R. CO., APPELLANT.

Appeal—Misnomer, no ground—Injury—Loss of Service, by whom recoverable.

Under the Code of Procedure, the only way to take advantage of a misnomer is by answer. Where the answer omits to set up such misnomer, no advantage can be taken of it on trial.

A mere misnomer is only a formal error, and is amendable in the Court of original jurisdiction, and not entitled to notice in this Court.

Where a child under age is injured, &c., the parent may recover for loss of service until the child attains the age of twenty-one years; and if the injury continue beyond the period of legal majority, the child may recover for such further loss.

THIS action was brought by the Plaintiff, in her maiden name, to recover damages of the Defendant for an injury alleged to have been caused by the carelessness of the Defendant's servants while the Plaintiff was a passenger upon one of its cars. After the injury was received, and before the commencement of this action, the Plaintiff intermarried with one Collins.

The Plaintiff was about eighteen years old at the time of the injury, and but a few months past twenty-one at the time of the trial.

Upon the trial, evidence was received as to how much the Plaintiff could earn per week prior to the injury, and that some money had been expended in taking care of her the last year preceding the trial, to which the Defendant's counsel excepted.

The Defendant moved for a dismissal of the complaint upon the ground, among others, that the action was improperly brought in the maiden name of the Plaintiff, but should have been brought in the name acquired by marriage. The Court denied the motion, and Defendant's counsel excepted.

It appeared that an action had been previously brought by the Plaintiff's mother, and a recovery had for the loss of services of the Plaintiff, and the expense of taking care of her.

The Court charged the jury that nothing could be recovered for

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these causes in the present action. The jury rendered a verdict in favor of the Plaintiff for twenty-five hundred dollars.

The Special Term of the Superior Court of New York denied a motion for a new trial. Judgment was entered on the verdict, which was affirmed, on appeal, by the General Term, from which the Defendant appealed to this Court.

J. H. Reynolds for Respondent.

J. W. Ashmead for Appellant.

GROVER, J.—Commencing the action in the maiden name of the Plaintiff, instead of that acquired by marriage, was a misnomer merely. There was no pretence but that the Plaintiff was the proper person to sue, and the only one that could maintain an action for the injury sought to be redressed. Under the practice prior to the Code, misnomer of either party could only be plead in abatement of the action (Graham's Pract. 2 v. and cases cited). Neglecting to interpose such plea waived any advantage to the Defendant therefrom. The mistake was amendable by the Court. The misnomer was not ground of nonsuit upon the trial. It was not like the case of bringing an action by the wrong party; that was ground of nonsuit. By the Code, pleas in abatement are abolished (Code, §§ 142–151). The only mode of presenting such a defence is, under the Code, by answer. No such defence is set up in the answer in the present case. It was, therefore, unavailable upon trial. In the Bank of Havana *v.* Magee (20 N. Y. 355), it was held that although there was no such corporation, and that it was only a name assumed by Charles Cook for the transaction of his banking business, yet bringing the action by Cook in such name was but a mere formal error, amendable in the Courts of original jurisdiction, and to be disregarded in this Court.

This case goes much further than it is necessary to go in the present. In that case, upon the papers, it would appear that the action was brought by a corporation, and not by Charles Cook, while in the present the Plaintiff was the same, whether called by the maiden or married name.

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The evidence of what the Plaintiff could earn before the injury was held by the judge not to be material, and the jury were instructed not to give any damages for loss of services, inasmuch as the Plaintiff's mother had previously recovered therefor. This direction would not have cured the error (if one was committed) in receiving the evidence, if that was such as was calculated to create a prejudice in the minds of the jury, and influence them in fixing the amount of damages, unless it appeared from the whole case that the jury were not so influenced (Erben *v.* Lorillard, 19 N. Y. 299). The evidence in the present case was not likely to influence the jury upon the question of damages, unless they were convinced that the injury of the Plaintiff was of a character to prevent her from attending to her business after she was twenty-one; and if so convinced, the evidence was proper for the consideration of the jury.

When a child under twenty-one is injured, the parent can recover for loss of service until the arrival of the child to that age, and, if the disability continues beyond that time, the child may recover for the loss. Upon this point the case was tried as favorably to the Defendant as the law required.

No claim for loss of service was made by the Plaintiff after she was twenty-one, and the jury were told that the mother had recovered for such loss up to that time. No ground of objection to the proof of what the expense of taking care of the Plaintiff had been, was stated. The exception to the proof does not, therefore, raise any question for the consideration of this Court.

The judgment appealed from must be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THE MAYOR, &c., OF NEW YORK, RESPONDENT, v. THE EXCHANGE FIRE INSURANCE COMPANY, APPELLANT.

Charter of the City of New York—Corporation Counsel—Corporation may employ additional Counsel.

The provision in the amended Charter of the City of New York, imposing on the Law Department the duty of conducting all the law business of the Corporation, was not intended to disable the City from prosecuting or defending suits without the consent of the Corporation Counsel; or to deprive it of the ordinary right of suitors to employ additional counsel when it deemed it necessary to do so.

APPEAL from judgment of the Superior Court of the City of New York, affirming judgment in favor of the Plaintiff, on the verdict of a jury, for $6,164.70.

The action was on a policy of insurance issued by the Defendant to the Plaintiff on the 23d of June, 1858, and covering the "Crystal Palace" building, which was destroyed by fire on the 5th of October following.

The principal grounds of defence were, that the suit should have been brought by a different attorney; that the corporation had no interest in the building which it paid the Defendant for insuring; and that the policy was forfeited by the continued use of the building for the purposes for which it was erected.

On the trial before Judge Woodruff and a jury, it appeared, among other things, that the lots on which the building was constructed belonged to the city of New York, in fee. On the 23d of March, 1852, the premises were leased for a term ending in January, 1857, at a nominal rent of one dollar a year, to Edward Rettle, in behalf of himself and his associates, for the purposes of the Association for the Exhibition of the Industry of all Nations, and the lease was assigned to that association upon the completion of its organization, a few days afterward. It appears on the face of the lease that the inducement to its execution was the proposed erection, on the vacant lots demised, of "a building of iron and glass, for the purpose of an industrial exhibition of all nations,"

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and upon the stipulation that the lessees should make such erection, and surrender the premises at the expiration of the term, in as good state and condition as reasonable use and wear thereof would permit, damages by the elements excepted.

The building was accordingly erected, and, until its destruction in 1858, it was always used for the purposes of industrial exhibitions, and for no others, except such as were incidental and appropriate to that object. This use involved the collection and operation within the building of various kinds of machinery and other industrial agencies, and the exhibition of a great variety of articles which would ordinarily fall in the classes of hazardous, extra-hazardous, and special risks, and the premium of insurance was fixed with reference to the contemplated use and the known character of the risks.

On the 15th of December, 1854, this property, with the other effects of the "Crystal Palace Association," passed into the possession of John H. White as receiver, and on the 31st of May, 1858, the term having expired, the city took possession, and the receiver surrendered it. The title and possession of the Plaintiff are unquestioned, except by the Defendant.

The purposes for which the building was always used, and the character of the articles and machinery exhibited within it, were generally known. The Defendants, under their former corporate title of the La Farge Fire Insurance Company, had repeatedly insured the building and its contents. They issued such a policy to the receiver in September, 1856, which was renewed in November, December, and January. They issued another in June, 1857, which was renewed in March, 1858; and the officers of the company were informed, on occasion of issuing such policies, of the fair of the American Institute being held there, as a reason for effecting the insurance. The descriptions in these successive policies substantially correspond with that to the Plaintiffs in the policies of 23d June, 1858; and the premium of $75 on the last policy, for a year's risk of $5,000, was at the same rate with the premiums previously exacted.

The policy described the insurance as "on the iron and glass

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building known as the Crystal Palace, situate on Reservoir Square, between Fortieth and Forty-second streets, and on the east side of Sixth avenue, in the city of New York, together with the furniture and fixtures now in the said building lately owned by the Association for the Exhibition of the Industry of all Nations, and since vested in John H. White as receiver, and also such other property lately vested in said White's hands as receiver, belonging to exhibitors, and lately in said White's custody and keeping, now remaining in said building." The policy contained the usual provisions and conditions of insurance. The term of the policy corresponded substantially with that of the lease from the city to the American Institute, which was made about the same time, at a rent of $6,000 a year.

The fire occurred some three months afterward, and the Plaintiff claimed only to recover in respect to the building, on which the loss largely exceeded the insurance.

The building was a permanent structure, covering some three acres of ground, connected in all its parts, and constructed on solid and fixed foundations.

Other facts appeared, which it is not material to state.

The jury found for the Plaintiff, and the judgment was affirmed at the General Term, the opinion of the Court being delivered by Barbour, J.

John W. Edmonds for Appellant.
Daniel Lord for Respondent.

PORTER, J.—There is no force in the objection that the attorneys who appear for the Plaintiff are not connected with the city law department. The provision in the amended charter, imposing on that department the duty of conducting all the law business of the corporation, was not intended to disable the city from prosecuting or defending suits without the consent of the "corporation counsel," nor to deprive it of the ordinary right of suitors, to procure such additional professional aid as the circumstances of particular cases might require. In this case it appears, affirmatively, that the action was brought with the assent of the corpo-

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ration counsel; but if there had been no proof on the subject, the authority of the attorneys would be presumed.

The objection that the Plaintiff had no insurable interest is equally unfounded. The Crystal Palace building, as well as the land on which it stood, belonged to the corporation. There is nothing in the terms of the expired lease, or in the evidence introduced by the Defendants, to give color to the claim they set up, in behalf of persons known or unknown, as an excuse for refusing payment, while they retain the premium of insurance.

The judge was right in admitting proof that the Defendants had insured the property for years, and knew the purpose for which the structure was erected, the manner in which it was occupied, the general character of its contents, and the nature and extent of the risk. These extrinsic facts were appropriate, as they tended to aid the Court in applying the descriptive language of the policy to the actual subject of insurance, and in giving effect to the words of the contract in the precise sense in which they were understood and employed by the parties (Bidwell *v.* Northwestern Ins. Co. 24 New York, 302; Agawam Bank *v.* Strever, 18 id. 509; Blossom *v.* Griffin, 14 id. 574; French *v.* Carhart, 1 id. 102).

When the policy is read in the light of the antecedent and surrounding circumstances, the import of the written language is in harmony with the manifest intention of the parties. The contract covered, and was designed to cover, the hazards incident to the occupation of the building for the purpose of exhibiting to the public the general processes and results of human skill in each of the various departments of active and practical industry. The premium was adjusted by the insurers with reference to the nature of the risk, and they cannot justly complain that the property was dedicated to the uses contemplated by them as well as the assured, and embraced in the descriptive terms of the policy (Harper *v.* Albany Ins. Co. 17 New York, 197; Townsend *v.* Northwestern Ins. Co. 18 id. 174; Hoffman *v.* Ætna Ins. Co. 32 id. 405).

Other questions were raised on the argument, but we think

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none of them call for particular discussion. The rulings of the judge were correct, and the liability of the Defendant is clear.

The judgment should be affirmed, with costs.

All the judges concurring,

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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RUFUS STORY, Respondent, v. ABRAHAM B. CONGER, Appellant.

Words—"Good and Sufficient Deed"—Construction—Real Estate.

An agreement to convey by a good and sufficient deed implies an agreement to make a good title.

On the 14th day of December, 1849, the Defendant and his wife conveyed to the Plaintiff certain real estate in the city of New York, and by the deed the Plaintiff covenanted that the premises were free and clear, among other things, of taxes and assessments. At the time of the conveyance there was a tax for the year 1849 of $189.31, which was a lien and encumbrance on the premises, and which the Defendant was then liable to pay.

The Defendant failed to pay the tax, and the Plaintiff paid the same on the 14th of February, 1850.

And for the recovery of the sum so paid, with interest, this action was brought.

The defence interposed is that, in conversation and negotiations between himself and the Plaintiff, in reference to the sale of the premises, it was understood that the Plaintiff was to take the same without the personal warranty or obligation of the Defendant, and that the Defendant was not to take any responsibility in respect to the title. A written agreement was entered into between the parties, by which the Defendant agreed to sell the premises to the Plaintiff, and convey and release the same to him by a good and sufficient deed; that the Plaintiff was then a tenant in possession; that the Defendant tendered to the attorneys of the Plaintiff, in his presence, a deed of the premises, without covenants or warranty; but they objected to the deed, alleging that a deed without the usual full covenants might throw suspicion on the title, and be an impediment in the way of disposing of the property, and urged the execution of a full covenant deed; and, to induce the Defendant to execute and deliver such a deed, they rep-

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resented to him that they had investigated the title to the premises, and that the same was perfect and free from all liens and encumbrance (except the mortgages referred to in the written agreement), and that the Defendant would incur no liability by giving the deed.

The Defendant, induced by and relying on such representations as true, executed and delivered the deed in the complaint mentioned; but such representations were untrue, and he was deceived thereby.

The Defendant prays judgment for the dismissal of the complaint, and that the deed be set aside, and another deed executed, pursuant to the agreement of sale, and in conformity with the stipulations, or that the covenants in the deed be declared inoperative and void as against the Defendant.

The Plaintiff, by his reply, denied all the material allegations of the answer.

The action came on for trial at a Circuit Court, held in and for the city and county of New York, on the 17th of May, 1859. The Plaintiff moved the Court, upon the pleadings, to direct the jury to find a verdict for the Plaintiff, for the amount claimed in the complaint, on the ground that the answer did not state facts sufficient to constitute a defence to the Plaintiff's action, which was granted, and the Defendant excepted.

The jury rendered a verdict in favor of the Plaintiff for $311.87.

The exceptions were directed to be heard in the first instance at the General Term, and, after argument, judgment was given in favor of the Plaintiff for the amount of the verdict.

The judgment was entered, and the Defendant appeals therefrom to this Court.

James A. Seaman for Appellant.
Charles Jones for Respondent.

HUNT J.—Two questions are presented by the present demand for a new trial: First, was the Defendant, by the preliminary agreement of sale, which was in writing, of the date of November 30, 1849, bound to pay the tax in question? Secondly, if he was

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not, has he stated facts enough in his answer to entitle him to the relief he desires?

In the answer, this agreement of sale is set out at length. By its first provision the Defendant agrees to sell to the Plaintiff the property in question, for a sum specified, "and to convey and release the same to him, by a good and sufficient deed, on the 15th day of December, 1849." The purchaser then agrees to pay the Defendant the sum of seven thousand five hundred dollars, to assume the payment of a fifteen thousand dollar bond and mortgage, then a lien upon the premises, to procure himself to be substituted as bondsman or mortgagor therein, or to procure the indemnity of Moses Taylor against any liability to the Defendant thereon.

In the case of Burwell *v.* Jackson (5 Seld. 535), the party had agreed "to execute, or cause to be executed to the party of the second part, on the first day of June, 1836, a good and sufficient conveyance of a certain lot of land in the city of Buffalo."

It was held that this contract bound the vendors to convey a good title to the purchaser. Here the party contracts "to convey and release by a good and sufficient deed." I see no difference in the legal effect of these expressions. The intent of each is to express an obligation to transfer a good title, and whether that result is accomplished by a deed of release or by a deed with covenants, is not important. The good title in each case is the thing to be attained, and nothing less than an actual good title will satisfy the contract.

When the Defendant, therefore, executed a deed by which he covenanted that there were no arrears of taxes upon the lots conveyed, he assumed no greater liability than his preliminary agreement called for.

If he had given a quit-claim deed, he would have remained liable upon his original agreement for the amount of this tax.

He has but fulfilled his contract, and has no occasion to ask for the interpretation of the Courts in his behalf.

These views render unnecessary a discussion of the second question. It is quite possible, from the allegations of the answer, that there was some misconception of the effect of the Defend-

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ant's contract, and that there was some misunderstanding as to the fact of the existence of the tax in question. No fraud is suggested, nor is it alleged that a mutual mistake existed on the point in question.

One of these allegations is indispensable in a complaint asking for a reformation of the contract (Nevins *v.* Dunlap, 33 N. Y. R. 676).

Upon his own statement of the contract, the Defendant has done no more than he was legally bound to do. If unjust or immoral means have been resorted to, to induce him to perform that duty, there is no remedy.

In its result the case stands where and as it ought to stand (Hutchins *v.* Hutchins, 7 Hill, 104; Story's Eq. Jur. § 203; Randall *v.* Hazelton, 12 Allen R. 412, 415). Judgment should be affirmed.

All affirm, except JJ. BOCKES and PORTER.

JOEL TIFFANY,
State Reporter.

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BEARDSLEY SCYTHE COMPANY, APPELLANT, v. JOHN C. FOSTER, RESPONDENT.

Assignor's Creditor's right to assert Assignee's claim against Debtor.

A creditor is not relieved from compliance with the requirements of the statute by the alleged insolvency of the debtor, when he seeks to impeach the validity of an assignment as being fraudulent.

A creditor who has in no manner succeeded to the rights of one of the partners, who has become the assignee of the effects of the firm, cannot assert such assignee's rights to redress against those who may be indebted to the firm.

APPEAL from the Supreme Court. The action was for equitable relief, and, on the hearing, the referee dismissed the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The judgment was affirmed at General Term in the Seventh Judicial District, the opinion of the Court being delivered by Mr. Justice Johnson.

The complaint, in substance, alleges the following facts:

In 1857, and the early part of 1858, Wm. H. Osborn and George Clow were partners in the business of manufacturing grain cradles, at Port Byron, conducting it under the firm-name of George Clow & Co. They became indebted to the Plaintiff in the sum of $2,203.34. Afterward, and on the 11th of May, 1858, the partnership was dissolved; and in consideration, among other things, of Osborn's paying the debts of the firm, Clow transferred to him his interest in its assets. In consequence of this arrangement, Osborn became so much involved as to be unable to pay or secure the liabilities so assumed. He made a statement of his affairs to the Defendant, who proposed the following arrangement, with a view of postponing the claims of the creditors: that Osborn should execute a bill of sale to him of the property and credits of the late firm; that the Defendant should redeliver the accounts and notes to Osborn for collection; that the latter should go on manufacturing until the property and credits were converted into money; that, with the avails, Osborn

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should *be at liberty* to pay up the liabilities of the late firm, on such terms as he could obtain; that the excess of the avails, beyond the amount required for that purpose, Osborn should invest as his share in a proposed partnership between him and the Defendant, in the milling and lumber business; that, except for the purpose of postponing the creditors of the late firm, its assets were to remain the property of Osborn, and the business of manufacturing should be continued at his expense, and for his benefit, though in the name of the Defendant.

Osborn acceded to this arrangement, and in pursuance of it the Defendant received a bill of sale, and took possession of the assets of the late firm, inventoried at $4,400, together with individual notes and accounts, due to Osborn, amounting to about $240.

In violation of this understanding and agreement, the Defendant unjustly refused to deliver up to Osborn the notes and accounts which belong to him, and has unlawfully converted them to his own use.

On the 15th of October, 1858, the Plaintiff obtained a judgment against Osborn, by confession, for $2,209.93, being the amount of the company's demands against George Clow & Co.

On the 25th of the same month, an execution was issued to the sheriff of Cayuga, the county in which Osborn resided, and he collected thereon the sum of $175.64; and the balance still remains due from Osborn, Clow & Co. He and they are bankrupt, and unable to pay any portion of the claim.

The Defendant has the property transferred to him, or its proceeds, and refuses to pay anything, either to Osborn or his creditors.

The complaint concludes with a demand that the Defendant be required to render an account of the property and its proceeds, and to deliver the same over to a receiver, to the end that it may be applied in payment of the debts due to the creditors of the late firm of George Clow & Co.

Finlay M. King for Appellant.
Amasa J. Parker for Respondent.

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PORTER, J.—The referee was right in holding that upon the facts alleged the Defendant was entitled to judgment. The Plaintiff was not in a position to affirm and enforce a contract, which was not made for his benefit, and to which he was neither party nor privy. It does not appear that he succeeded in any way to the right of Osborn, and he cannot assert the claim of the latter to redress for the wrongs he imputes to the Defendant. He does not demand a judgment declaring the invalidity of the transfer from Osborn to Foster, nor does he allege a state of facts entitling him to that relief. His remedy at law is not exhausted, and his execution is unreturned. The complaint cannot be sustained on the footing of a creditor's bill; and, assuming all its allegations to be true, no cause of action results in favor of the Plaintiff. He is not relieved by the alleged insolvency of the debtor from the necessity of complying with the condition of the statute, if he would impeach the transfer as fraudulent (Crippin *v.* Hudson, 13 New York, 165; Dunlevy *v.* Tallmadge, 32 id. 461).

A reversal is claimed on the further ground that the costs awarded at Special Term are embraced in the record of judgment. An affirmance at the General Term was clearly improper, but the correction should be made on motion in the Court below, after the record is remitted.

The judgment should be affirmed, with costs. Judge BOCKES also read an opinion for affirmance.

All the judges concurring,

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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THOMAS FIELDEN ET AL., APPELLANTS, v. PIERRE FRANÇOIS LAHENS ET AL., RESPONDENTS.

Note, Accommodation — Authority of Partner to make or endorse — Notice. Code, §§ 136, 274.

As it is no part of the business of a mercantile firm to make or endorse notes for third persons, there is no implied authority for an individual member of such firm to make or endorse such paper in the firm name. Consequently the holder of such paper, with notice that it was made or endorsed for purpose of accommodation merely, without the consent of the firm, cannot recover upon it.

Where the maker of a note, endorsed by a firm, presents the same to be discounted for his accommodation, such fact shows upon its face that it is a mere accommodation endorsement.

PARKER, J.—This action was commenced in the Superior Court of the City of New York, on the 21st of October, 1844, against the Defendants, as alleged endorsers of three promissory notes, all dated May 25th, 1844, two of them payable at ninety days, and one at sixty days from date; one for $14,000, one for $13,500, and the third for $21,221.43, making in all $48,721.43. They were in the common form, signed by Alexander Caselli, as maker, and endorsed with the name of J. Lahens, &c.

The Defendant, Louis Emile Lahens, appeared by one attorney, and the Defendants, Pierre François Lahens and Edward Ernest Lahens, by another, and put in separate pleas of the general issue, and the cause was referred to three referees, who, upon the trial, which commenced February 4, 1858, nonsuited the Plaintiffs.

The referees found as follows:

First. That at the time of the making of and endorsing of the promissory notes in the declaration in this action set forth, Joshua Fielden, John Fielden, James Fielden, Thomas Fielden, Daniel Campbell, and William C. Pickersgill were copartners in trade under the respective firms of Fielden Brothers & Co., at the city of Liverpool, in England, and of W. C. Pickersgill & Co., at the city of New York; that the said Joshua Fielden, John Fielden, and James Fielden have since departed this life, and that the said Thomas Fielden, Daniel Campbell, and W. C. Pickersgill have

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survived them; also, that at the time of the making and endorsing of the said promissory notes, Pierre François Lahens, Edward Ernest Lahens, Edward Gaudard, and Louis Emile Lahens were copartners in mercantile business at Havre, in France, and at the city of New York, respectively, under the firm of J. Lahens & Co.; that the said Louis Emile Lahens was the only one of said copartners then residing in the city of New York, or in the United States; that the said Edward Gaudard has since departed this life, and that the Defendants in this action have survived him.

Second. That the endorsements of the name of J. Lahens & Co. upon the said promissory notes were made and executed in the city of New York by the Defendant, Louis Emile Lahens, one of the members of said firm, and delivered by him to Alexander Caselli, the maker of the said notes, in said city, for the accommodation of said Alexander Caselli, and that no consideration was received by the said J. Lahens & Co. for the same.

Third. That the notes so endorsed were delivered by the said Alexander Caselli, the maker thereof, to the said firm of W. C. Pickersgill & Co. at said city of New York.

Fourth. That the said W. C. Pickersgill & Co., by the fact of such possession and delivery of the said notes to them by the maker thereof, after the same had been so endorsed with the name of said J. Lahens & Co., had notice that the said J. Lahens & Co. had received no value therefor, and that the said endorsements were made for the benefit and accommodation of the maker of the said notes.

Fifth. That the Plaintiffs had failed to prove a joint liability of the Defendants, and further report that, upon the said facts so found, as a conclusion of law, the Plaintiffs, having so failed to prove a joint liability of all the Defendants, cannot recover in this action against the said Defendants, or against any or either of them.

And we do therefore decide and determine that all the Defendants are entitled to judgment against the Plaintiffs, and for their costs.

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The judgment entered upon the report of the referees was affirmed by the Court at General Term.

The questions considered and decided by the referees, as their report shows, were: first, whether the firm of J. Lahens & Co. was liable upon the endorsements; and second, whether, if it was not, a separate judgment could be rendered in the action against Louis Emile Lahens, who made the endorsement.

The facts found, bearing upon the first question, are that the firm of J. Lahens & Co. was a mercantile firm; that Louis Emile Lahens, one of the copartners, made the endorsements in the name of the firm, for the accommodation of the maker, without consideration to the firm; that the Plaintiffs received the notes, so endorsed, from the hands of the maker, and that by the fact of their so receiving them they had knowledge that the firm of J. Lahens & Co. had received no value therefor, and that the endorsements were made for the maker's accommodation.

These facts undoubtedly warrant the conclusion of law that the firm was not liable upon the endorsement.

The principle of the cases is, that inasmuch as it is no part of the business of a mercantile firm to make or endorse notes, as a firm, for third persons, there is no implied authority for one member to endorse or affix the name of the firm to negotiable paper, in which the partnership has no interest for such purpose, and that the holder of such paper, so endorsed, who takes it with notice that the endorsement was made for the accommodation of the maker, cannot hold the firm liable upon it (Stall *v.* Catskill Bank, 18 Wend. 466, 477, 478; Bank of Rochester *v.* Bowen, 7 Wend. 158; Joyce *v.* Williams, 14 Wend. 141; Gansevoort *v.* Williams, id. 133; Austin *v.* Vandermark, 4 Hill, 259).

The finding that the Plaintiffs had notice of the fact that the endorsements were mere accommodation endorsements, it is insisted by the Plaintiffs' counsel, is but a conclusion of law, and not a finding of fact, and is, therefore, open to examination. Inasmuch as the fact of notice is based upon the facts of the possession of the notes by the maker, and his delivery of them, bearing the endorsement of J. Lahens & Co., to the Plaintiffs, thereby

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using them for his own benefit, the question of the legal sufficiency of such facts to constitute notice to the Plaintiffs is undoubtedly involved in the finding. Treating it, therefore, as a conclusion of law, from the facts distinctly found and necessarily inferred, I think the referees right in their conclusions.

It was said by the Chancellor, in Stall *v.* Catskill Bank (18 Wend. 478), "If the drawer of a note carries it to a bank to get it discounted on his own account, or transfers it to a third person, with the name of a firm endorsed thereon, the transaction on its face shows that it is a mere accommodation endorsement, or the note would not be in the hands of the drawer; and the bank, or person who receives it from the drawer, being thus chargeable with notice that the firm are mere sureties of the drawer, and that it has not passed through their hands in the ordinary course of partnership business, the members of the firm who have been made sureties without their consent are not liable to such holder of the note."

This statement of the rule is, I think, substantially correct. The note being held by the maker, and put into circulation by him, in his own business, and for his own advantage, is evidence to the party taking it that whatever endorsements may be upon it were made for the maker's benefit, and not in the ordinary course of business; for, in the ordinary course of business, it would have passed from the maker to the payee and endorser. The party receiving it, therefore, from the maker, in payment of the maker's debts, assumes the risk of being able to show that the endorsement was in the usual course of business, and that the partners all consented to the act of the one who made the endorsement. As between the firm and the holder of the paper, this is but a reasonable rule. The partners are liable to a bonâ fide holder *without notice* in such case, only because he has the right to presume that the endorsement was made in the usual course of the partnership business, and, therefore, within the scope of the authority of the individual member of the firm who made it. But when the circumstances are such as to inform the holder of the fact that the endorsement was not made in the course of the partnership business, such presump-

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tion is excluded; and it would be inequitable as well as illegal, as between the firm and the holder, for the Court to presume the assent of the firm in favor of the holder thus notified (Austin v. Vandermark, 4 Hill, 262; The Bank of Vergennes v. Cameron, 7 Barb. 143).

The finding that the Plaintiffs had notice that the endorsements were for Caselli's accommodation, being warranted, it follows that no judgment could be rendered upon them against the members of the firm, other than Louis Emile Lahens.

The next question is, could a several judgment be given against Louis Emile Lahens?

It was well settled at common law that in an action against several Defendants, on an alleged joint contract, no recovery could be had against any of them, unless a joint contract made by all of them was established (Mitchell v. Ostrom, 2 Hill, 520).

The Code has changed this rule in respect to actions commenced since it took effect. Section 136 of the Code has this provision: "If all the Defendants have been served, judgment may be taken against any or either of them severally, when the Plaintiff would be entitled to judgments against such Defendant or Defendants, if the action had been against them or any of them alone." Section 274 has this: "Judgment may be given for or against one or more of several Plaintiffs, and for or against one or more of several Defendants."

Section 8 restricts the application of that portion of the Code relating to civil actions to such as are commenced after the first day of July, 1848, except where otherwise provided.

By enactments in 1848 and 1849 certain sections of the Code were applied to rules commenced before it took effect, but §§ 136 and 274 are not among the number so applied. In 1851 § 459 of the Code was amended so as to read as follows: "The provisions of this act apply to *future proceedings* in actions or suits heretofore commenced and now pending, as follows: 1. If there have been no pleading therein, to the pleadings and all subsequent proceedings: 2. When there is *an issue* of law or *of fact*, or any other question of fact to be tried, *to the trial and all subsequent proceedings.*"

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This section the learned Court below held did not extend the provisions of §§ 136 and 274 to suits pending when the Code went into operation. I confess I am differently impressed as to the effect of that section. It seems to me that it is within the scope and intent of its provisions to allow judgment to be taken against any or either of the Defendants severally, when the Plaintiff would be entitled to judgment against such Defendant or Defendants, if the action had been against them or any of them, as § 136 provides.

The proceeding for which the Appellants contended—the entry of a several judgment against Louis Emile Lahens—is a proceeding in the action such as § 136 provides for, and the language of § 459 is clearly broad enough to apply § 136 to this case. Section 459, in effect, says that the trial and all subsequent proceedings, in actions brought before the Code took effect, in which an issue had been joined and not tried, are to be conducted in all respects as though the actions had been brought after the Code took effect.

Upon the trial of the case at bar came up the question, what was to be the course of proceedings? But one of the Defendants being shown to be liable upon the endorsements, and two of the Defendants not liable, under the Code, confessedly the thing to be done upon the trial, in such case, is to dismiss the complaint as to the two, and to render judgment against the one. Any other course in respect to the present case is a failure to apply the provision of the Code to the proceedings in the case, as § 459 requires.

The injustice of an enactment which, in effect, deprives a Defendant of a perfect defence to the action, and changes his right to recover costs into an obligation to pay them, is urged, as showing that the Legislature could not have intended to apply the new rule in question to pre-existing suits. The defence insisted upon is a mere technical one, not founded on the merits, and the advantage which the Defendant had under the old rule, a mere adventitious one dependent upon a then existing rule of a practice or proceeding—a mere *formal* proceeding—a *mode* of arriving at a result—the judgment to which the Plaintiffs have shown them-

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selves entitled—such advantages are not usually deemed entitled to protection, upon a legislative change of modes of procedure.

Thus, prior to the Code, a variance upon the trial between the allegation in a pleading and the proof might be fatal to the Plaintiff's case, which, under § 169 of the Code, would be disregarded. If the Plaintiff, in an action commenced prior to the Code, had made an actual averment in his declaration, *that* gave the Defendant an advantage which would have operated as a defence, and entitled him to costs; and yet the legislature, by the act of April 11th, 1849, chapter 438, expressly apply § 169 of the Code to actions pending when the Code took effect; by which section, such inaccuracy, which, as it stood, effectually shielded the Defendant from a recovery against him, might be deemed immaterial and wholly disregarded.

Again, in an action before the Code, a party Defendant could not be required to give evidence in favor of his adversary, and so stood secure against a judgment when he and the Plaintiff were the only depositaries of the facts on which the cause of action depended. This was a technical advantage of which the legislature did not hesitate to deprive him by the same act of 1849, when it provided that § 390 of the Code, which allows a party to an action to be examined as a witness at the instance of the adverse party, should apply to the pre-existing suits.

It is difficult to see any more injustice done the Defendant in the application of § 136 to pre-existing suits, than in the application to them of §§ 169 and 309, and various other sections especially applied by the act of 1849, having a similar effect.

The advantages held by parties in those suits, depending not upon rights, but upon remedies, the Legislature seems not to have been careful to protect, but on the contrary quite ready to disregard, in providing for uniformity of proceedings in suits, whether commenced before or after the Code. So that it would not be safe, I think, to infer that there could have been no intent through § 459 to apply § 136 to pre-existing suits.

The exception to the exclusion of the Defendants' articles of

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copartnership cannot be sustained. It cannot be pretended that, under the rules governing trials at law, the Plaintiffs were, after having closed their case, entitled to open it and introduce evidence, not rebutting, but competent and proper in the first instance to make out their case. The referees had the right, in their discretion, to admit or exclude this evidence, and their decision is not subject to review upon appeal.

The referees decided correctly in admitting the deposition of Caselli. It was taken upon a commission in 1845, upon an examination in which the parties joined. So far as appears, the commission and return were regular, and there was no objection to the examination when taken. If the witness was then incompetent on the ground of interest, that might have been good cause of objection to the commission. No objection, however, so far as appears, was then made. But that he was interested was no ground of exclusion when the testimony was offered on the trial. He was then a competent witness, and his evidence was properly received.

The judgment of the Court below is right as to the Defendants Pierre François Lahens and Edward Ernest Lahens, and to that extent should be affirmed, with costs.

But as to Louis Emile Lahens, inasmuch as it appears that the Plaintiffs were nonsuited as to him, not because they failed to show him liable, but because the other Defendants were not jointly liable with him, the judgment is erroneous, and should be reversed, and a new trial granted, costs to abide the event.

Affirmed as to P. F. Lahens and E. E. Lahens, and reversed as to L. E. Lahens.

JOEL TIFFANY,
State Reporter.

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EZRA P. DAVIS, RECEIVER, ETC., APPELLANT, v. FRANCIS MORRIS, ET AL., RESPONDENTS.

Pleading—Equitable relief first—Lease—Assignment.

Under the Code, the same complaint may contain legal and equitable causes of action; the legal causes should be tried by a jury, and the equitable may be tried by the Court.

When the Court erroneously decide, on motion of Plaintiff, that the Defendant is not entitled to a jury because the complaint sets up an equitable cause of action, it is no waiver by the Plaintiff of any legal cause of action contained in his complaint; and should he fail to establish an equitable cause of action, he may, nevertheless, recover upon any legal cause of action which he may establish, as contained in his complaint.

To render the assignee of a lease liable for rent to the lessor, the whole term must be assigned and transferred to the assignee. Therefore, an assignment reserving the last day of the term, does not render the assignee thus liable to the lessor.

PRIOR to eighteen hundred and fifty-two, Nicholas Dean had been duly appointed by the Court of Chancery receiver of the rents and profits of lot 212 Broadway, in the city of New York.

In that year an order was duly made by the Supreme Court, empowering and directing said receiver to lease the same for twenty-one years to the highest bidder, subject to be sooner terminated upon certain contingencies not material in the present action.

The lease was to bind the lessee to erect upon the lot a building, costing not less than ten thousand dollars, which was to be left upon the lot at the expiration of the term. Dean, pursuant to said order, leased the lot for the term, upon the conditions specified, to Defendant Hudson, at an annual rent of fourteen thousand five hundred dollars, payable quarterly. Soon after the execution of said lease, and on the 25th day of March, 1853, Hudson executed to Defendant Morris an instrument, by which he transferred to him all the unexpired term of said lease, except the last day thereof, with the right to surrender the same by Morris to Hudson at any time after the expiration of three years,

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subject to the rents, covenants, conditions, and provisions contained in said lease. This instrument was executed by Hudson and Morris. The lease provided that in case the rent was not paid as it became due, or any of the covenants of the lessee were not performed, the lessor, &c., might re-enter, and that the lease from thenceforth should be void. On the same twenty-fifth of March, Hudson and Morris made another agreement, in writing, reciting the transfer to Morris as above, and providing that Morris should advance to Hudson fifteen thousand dollars for the purpose of erecting the building required by the lease, and that Hudson should furnish the additional funds requisite for that purpose, unless Morris should choose to advance an additional amount; and providing, further, that the interest in the lease transferred by Hudson to Morris, and the building to be erected upon the lot, should be owned equally by the parties, as tenants in common, and that Hudson should superintend the erection of the building, and have charge of letting the same, and that Morris should collect the rents, and take the charge of the financial matters, and that taxes, &c., and all rents running and becoming due on said lease, after the completion of the building, should in the first instance be paid out of the rents and income of the building; and providing that the rents accruing upon the lease before the completion of the building should be paid by the parties equally.

The contract contained various other provisions, not material to the present case. On the 10th of June, 1853, the Defendants, Hudson and Morris, made a further agreement, in writing, by which, after reciting the agreement of the 25th of March last above stated, provided that Hudson, in consideration of one thousand dollars, bargained, sold, and assigned, and transferred to Morris all his (Hudson's) right, title, and interest, property, profit, claim, and demand, under and by virtue of said last-mentioned agreement, and in and to the premises therein mentioned, provided that nothing contained should in any manner whatsoever affect the right of Morris to surrender the said premises in the manner mentioned and set forth in the assignment of the same to Morris.

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Morris went into possession, erected thereon an expensive building, paid the rent reserved by the lease until May, 1855, and remained in possession until May, 1857, during which last period he paid four thousand dollars rent only upon the lease.

In July, 1857, Dean having died, and the Plaintiff having been duly appointed receiver in his stead, entered upon the premises for non-payment of the rent reserved by said lease, and evicted the Defendant therefrom, and still remains in possession of the same. The issues joined were brought to trial by the Plaintiff, at a Special Term of the Supreme Court; and, upon the trial being moved, the Defendant demanded the cause be tried by jury. This was denied by the Court, and an exception duly taken.

Upon the trial the Plaintiff offered to prove that Hudson, during all the time Defendant was in possession, and still, was insolvent.

This evidence was rejected by the Court, to which the Plaintiff's counsel duly excepted. The Plaintiff further offered to prove that Morris, while in possession, received rents and profits to an amount equal to that due the Plaintiff for rent upon the lease.

This evidence was also rejected by the Court, to which the Plaintiff's counsel duly excepted. At the close of the proof, the Defendants' counsel moved to dismiss the complaint, which was granted by the Court, to which Plaintiff's counsel excepted.

The Plaintiff made no request to proceed to a recovery of a separate judgment against Hudson, and the Court made no ruling upon this point.

The judgment dismissing the appeal was affirmed by the General Term, from which the Defendants appealed to this Court.

Mr. J. H. Reynolds for Appellant.

Messrs. Russell & O'Connor for Respondents.

GROVER, J.—This action was brought by the Plaintiff, as receiver, to recover rent due upon a lease of lot 212 Broadway, in the city of New York, given by the Plaintiff's predecessor, as receiver, to Hudson, one of the Defendants.

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The Plaintiff claimed to recover against the Defendant Morris upon equitable grounds, and therefore brought the case to trial at a Special Term, when the Defendants insisted that the cause should be tried by a jury.

This was denied by the Court, and the cause tried without a jury. The Defendants' counsel now insists that this was a waiver by the Plaintiff of any right of recovery upon strictly legal grounds, and that, unless it appeared upon the trial that the Plaintiff was entitled to recover in equity, the judgment dismissing the complaint should be affirmed, although it appeared that the Plaintiff was entitled to recover at law.

This position cannot be maintained. The Code (§ 69) abolishes the distinction between actions at law and suits in equity, and provides that thereafter there shall be in this State but one form of action for the enforcement or protection of private rights. Section 142 provides that the complaint shall contain a plain and concise statement of the facts constituting a cause of action. Where, as in the present case, the complaint states facts showing, as the Plaintiff claims, a right of recovery both in equity and at law, the question as to how the case is to be tried arises. The Constitution, article 1, § 2, provides that the trial by jury, in all cases in which it has heretofore been used, shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases, in the manner to be prescribed by law. At the time of the adoption of the Constitution all cases at common law were tried by jury. It follows that any party has the right to have any such action so tried at the present time, and that the Defendant cannot be deprived of this right, by the Plaintiff including in his complaint a statement of facts arising out of the same transaction, showing a right of recovery in equity. Suits in equity were never tried by jury, unless an issue was ordered by the Court for the trial of some specific fact. Under the Code it is clear that the facts entitling the party to both kinds of relief may be included in the same complaint, and both obtained in the same action, when arising out of the same transaction. The right founded upon the common law must be tried by

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jury, and it would seem to follow, necessarily, that the entire cause must be so tried, as no provision is made for the trial of the issues joined in the same action. It would follow that, when a Plaintiff moved the trial of a case at Special Term, and the Defendant demanded that it be tried by jury, that the Judge must determine whether any of the grounds upon which a recovery was sought were such as, at the adoption of the Constitution, were redressed solely by an action at law, and if so, should direct the cause to be tried by a jury, at a Circuit, or, at all events, should refuse to try the cause without a jury. But should the Judge decide erroneously in this respect, and proceed to try a cause without, which should be tried by a jury, on motion of the Plaintiff, it would not operate as a waiver of any of the legal rights of the Plaintiff; and should the Plaintiff fail to show himself entitled to any equitable relief, but should show a right to legal relief, the Judge should not dismiss the complaint, but still order the case to be tried by a jury, as an action at law. If the above views are correct, it follows that it must be determined in the present case whether the Plaintiff could recover the rent, or any portion of it, of Morris, either at law or in equity.

There are general grounds upon which it is insisted that Morris was liable to pay the rent in equity, although held not liable at law.

First, that the assignment of the lease on the 25th March, 1853, being made subject to the rents, covenants, and conditions, &c., mentioned in the lease, created a charge upon the property for the payment of the rent; and Morris, having accepted the assignment and occupied the property, became liable in equity for its payment. No authority sustaining this proposition is cited by the counsel, nor have I found any.

It is in conflict with the well-settled rule in regard to the acceptance of a conveyance of real estate, encumbered at the time, made subject to such encumbrance.

In this class of cases it is well settled that no liability, either at law or in equity, is imposed upon the grantee. The holder of the encumbrance has no remedy against such grantee personally,

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however long he may have enjoyed the possession, or whatever profits he may have received therefrom.

I do not see how equity can give any additional force to these words, when used in the assignment of a lease, to what it gives them when found in a conveyance.

To hold in the former a liability was created, and not in the latter, in the absence of any sound reason for the distinction, would be absurd. I can see no reason for making any such distinction in such cases. Whether Morris is bound to indemnify Hudson against the claim for rent, is a question not arising in the present case, as the Plaintiff has no right of subrogation to any such claim, if it exists. Hudson can in no sense be regarded as the surety of Morris for the rent. To establish any such relation it must first be shown that Morris is liable to the Plaintiff therefor, which is the point for the Plaintiff to establish.

Morris did not become liable in equity to the Plaintiff by reason of his possession and receipt of the rents. Were this so, every tenant holding by lease from the original lessee would be liable to the first lessor, for such tenant receives the profits; yet the books furnish no trace of such a liability in equity.

This affords a strong argument that such liability does not exist.

It is insisted that by the agreement of March 25 a quasi partnership was created between Hudson and Morris in the leasehold premises and building erected thereon, and that, by agreement, the rent in question was payable out of the rents to be received for the building, and Morris, having received the rents, is in the situation of a partner having in his hands funds of the firm applicable to the payment of its debts, and is therefore bound in equity so to apply such funds.

Deveau v. Fowler (2 Paige, 400) is cited in support of this proposition. This leads to an inquiry whether the agreement of March 25, 1853, created a partnership between Hudson and Morris. If it did, the proposition of the Plaintiff's counsel is sound, if the rents were received under that agreement. But that agreement created no partnership.

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It provided for the erection of the building, and that the parties should own the same together, with the leasehold premises, as tenants in common, and further provided what disposition should be made of the funds thereafter received for rent of the building. This agreement was between the parties for the application of funds belonging to them in common, but contained no undertaking to pay the whole or any part to third persons. No such persons are named in the agreement. While either party could maintain an action against the other for the breach of the agreement, the Plaintiff acquired no right of action against both or either of the parties for such breach.

My conclusion is that the Plaintiff failed to show by the evidence given, and that offered upon the trial, any right to equitable relief.

It remains to inquire whether he showed, or offered to show, any legal liability against Morris for the payment of the rent. It is clear that no such liability was incurred by accepting and executing what was called the assignment of the lease by Hudson to Morris, reserving to the former the last day of the term.

The settled rule is, that to render the assignee of the lessee liable for the rent to the lessor, the entire term must be transferred to the assignee (Eaton v. Jacques, 2 Douglass, 459; Van Rensselaer v. Gallup, 5 Denio, 460). Nothing contained in the agreement of March 25th, which was made and executed by the parties contemporary with the transfer of the lease, and made to effectuate the same general intent, created any such liability. This agreement left the last day of the term of the lease exclusively to Hudson.

There is nothing in the agreement giving Morris any right to the premises for that day. There is no doubt but that the reservation of this last day by Hudson was the result of a design of the parties to prevent Morris becoming liable for the rent. There does not appear to have been any other reason therefor. The parties had the right to make their contract as they did to accomplish that object.

No liability was created against Morris for the rent within the

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principle of Lawrence v. Fox (20 N. Y. 268), for the reason that there was no agreement by Morris to pay the rent received, or any portion of it, to the Plaintiff.

The principle of that case is, that when a party agrees to pay another a sum of money, when the consideration is rent received from a third person, the contract inures to the benefit of the former, who can maintain an action thereon for the recovery of what is so agreed to be paid. To bring a case within this principle there must be an agreement to pay to such party.

That is not this case. Here there is nothing but an agreement between parties determining what application shall be made of a sum of money belonging to them; and although they agree that the rent in question shall be paid out of this money, no right of action against both, or either of the parties, accrues to the Plaintiff upon the agreement. The only remaining ground of liability claimed against Morris arises upon the agreement of June 10, 1853.

It is claimed that this agreement gave Morris the entire term of the lease, including the last day.

If this be so, Morris became liable as assignee of the lessee for the rent to the Plaintiff, while he continued the owner of the term. This is conceded by the counsel of the Defendant. In this agreement that of the 25th of March is recited, and Hudson, for the consideration of one thousand dollars, as expressed in the agreement, sells and transfers to Morris all his interest under and by virtue of said recited agreement, and to the premises therein mentioned, providing that the agreement should not affect the right of Morris to surrender the premises as provided in the assignment of the lease.

The inquiry is, whether the parties intended by this agreement to transfer to Morris the last day of the term. This depends upon the meaning of the word premises as first used in the agreement.

This meaning can only be determined by reference to the residue of the agreement, as the word is used to express a great variety of ideas. It may mean the term, or other matters specified in the recited agreement, or it may mean the lot covered by the lease, or the term for which it was leased, or all these matters.

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My conclusion would be that it embraced the two latter, more than aught else, in the agreement. To prevent such conclusion, the right of surrender is carefully reserved to Morris.

It was an undisputed rule of the common law that an estate could not be transferred by surrender, unless the surrenderee was the owner of a reversion in which the estate surrendered would merge or be attached.

This right of surrender could only be available in case Hudson retained his reversion of the last day of the term, and therefore shows that it was the intention of the parties that this last day should not be transferred to Morris, but retained by Hudson.

This, I think, controls the meaning of the word premises, and shows that it was not designed to embrace the term specified in the lease.

This being so, Morris did not, by this agreement, become the owner of the entire term, and is not liable as assignee to the Plaintiff for the rent in question.

The fact that the Plaintiff has already recovered the premises, together with the valuable building thereon, can have no bearing upon the determination of any of the points involved in the case.

Notwithstanding he has acquired this building by virtue of the lease, he would still be entitled to a separate judgment against Hudson for the rent, had he asked for such judgment.

But as no such judgment was asked for by the Plaintiff, the judgment as to Hudson cannot be reversed upon this ground. The above views, if correct, show that the insolvency of Hudson, and the amount of rent received by Morris, were wholly immaterial questions.

The evidence offered upon these points by the Plaintiff was properly excluded.

The judgment appealed from should be affirmed.

All concur, BOCKES and PORTER, JJ., in result.

JOEL TIFFANY,
State Reporter.

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THE UNION BANK, &c., APPELLANTS, v. ABIAL P. BUSH AND OTHERS, RESPONDENTS.

Judgment—Power to reform—Pleading—Mistaken Averment—Variance.

A party is not estopped by a mistaken averment of the law in his pleadings. But the Court will give such relief as he appears to be entitled to, notwithstanding such mistaken averment.

Where the opposite party has not been misled by such mistake, the party making the averment will not be precluded from asking such relief as the Court, upon a view of the case, shall deem him to be entitled to.

DAVIES, CH.J.—The Plaintiffs in this action, on the 13th day of February, 1857, recovered against the Defendants, Abial P. Bush, Luther Bush, and Obadiah H. Bush, composing the firm of A. P. Bush & Co., three several judgments, as follows: One for the sum of $2,071.19, and $9.96 costs; another for the sum of $1,029.79, and $9.96 costs; and the other for the sum of $2,037.40, and $9.96 costs. On the 27th of July, 1857, there was a balance due the Plaintiff on said payments of $3,300, and on the said 27th day of July, the Plaintiff loaned to said Defendants, composing said firm, a further sum of $2,900; whereupon the said Defendants made and confessed a judgment to said Plaintiff for the sum of $6,200, and authorized the entry of a judgment therefor; and on said 27th of July, 1857, the said judgment was duly docketed in the clerk's office of Sullivan county, for the sum of $6,200, and $6.38 costs.

The confession or statement was in these words: "We do hereby confess judgment in this cause in favor of the above-named Plaintiff, Nathan S. Hammond, president of the Union Bank, for the sum of six thousand two hundred dollars, and authorize judgment to be entered therefor against us.

"This confession of judgment is for a debt justly due to the Plaintiff, arising upon the following facts: For balance due upon three several judgments in the Supreme Court, in favor of Plaintiff, against these Defendants, which judgments were docketed 185–, and were obtained upon notes discounted by the Union Bank

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of Sullivan County for the Defendants, and the avails paid to us. And also for money this day loaned by the Union Bank of Sullivan County to the Defendants, for which, in addition to the above balance, this judgment is confessed." This statement was signed by all the Defendants, and verified in accordance with the provisions of the Code.

On the 17th of September, 1857, the Defendants conveyed their real estate to one James F. Bush, who took the same with a knowledge of the existence of the aforesaid judgment, and of the items composing the same.

The consideration named in the deed was $25,000, of which the amount of said judgment formed a part.

It is unnecessary, in the view we take of this case, to trace out the titles and liens of the various parties and corporations, Defendants herein, claiming to have acquired the same subsequent to the date of the docket of the Plaintiffs' judgment, July 27, 1857.

On the 27th day of March, 1858, the Plaintiffs, by virtue of an execution issued upon the said judgment, caused the real estate of the Defendants to be sold, and they became the purchasers thereof.

This action was commenced for the purpose of reforming the judgment, and having the same declared a valid and subsisting lien on the property of the Defendants herein; the Defendants claiming that the same was void, and constituted no lien upon the real estate of the Defendants named in said judgment.

The complaint set out all the facts connected therewith, and that the consideration of the three judgments mentioned in the said confession of judgment of July 27, 1857, was three several promissory notes, made by the said firm of A. P. Bush & Co., and discounted by the said Plaintiff, and the avails thereof paid to said firm. That on the 13th day of February, 1857, the said notes became due and payable, and the same being unpaid, the said Plaintiff, on said 13th day of February, 1857, recovered three several judgments against the members of said firm, one for $2,071.19, and $9.96 costs; one for $1,029.79, and $9.96 costs; and the other for $2,037.40, and $9.96 costs. That at the time of

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docketing said judgments the Defendants therein were possessed of real estate, upon which the said judgments became a lien.

That on the 27th of July, 1857, the said Defendants had pressing need of further advances by the said Plaintiff, and represented that a further loan by said Plaintiff, to the extent of $2,900, was requisite to enable them to meet their liabilities, and they then promised and agreed to give said Plaintiff a lien by judgment or mortgage upon all their real estate for the amount of said proposed loan, together with the balance remaining due upon the said three judgments.

That the balance remaining due upon the said three judgments was on that day $3,300, and that said Plaintiff did thereupon, on said 27th day of July, loan to said firm the further sum of $2,900, making, with the balance due on said three judgments, the sum of $6,200; and thereupon said Defendants made, and subscribed, and verified the said confession of judgment, as already mentioned and set forth.

The complaint then states the several liens and interests of the other parties in this action acquired subsequent to said 27th day of July, 1857, and which the said Plaintiff claims and insists are subordinate to the lien of the said judgment docketed on that day in favor of said Plaintiff.

The Plaintiff also alleges that, by virtue of an execution issued upon said judgment, the real estate of the said Defendants had been sold by the sheriff, and that the said Plaintiff had become the purchaser thereof.

The Plaintiff then avers, upon information and belief, that said judgment, and said sale by virtue thereof, are irregular and defective, by reason of an omission and mistake on the part of the attorney employed to enter up the same, in not setting forth the facts out of which the indebtedness arose, in said statement and confession of judgment. And the Plaintiff alleged that by reason of such omission the title of said Plaintiff to said real estate so purchased would be irregular and defective. That the Defendants, or some of them, claim and allege that there was no authority in law for entering and docketing said judgment, and that the Plain-

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tiff can acquire no title to said lands by virtue of a sale under the same, and insists that the Plaintiff has acquired no lien by virtue thereof, or any right or title to said lands by reason of said sale and purchase, in consequence of said defective confession of judgment.

The Plaintiff therefore claimed and asked the judgment of the Supreme Court, that his said judgment might be amended and reformed. That said sale, under and by virtue of the same right, may be in all things confirmed to the said Plaintiff, as in all respects legal and valid, and that said Plaintiff's said equitable lien upon said lands and real estate may be enforced, and the said real estate may be charged with the payment of the same, from the day of the date of said judgment, or for such other or further judgment as may be just.

The action was tried by a Court, without a jury, and the facts found substantially as stated in the Plaintiff's complaint.

Judgment was entered declaring said judgment inoperative and void, for want of a sufficient statement and confession, as against all the Defendants in this action, except the judgment debtors in said judgment, and that said judgment ought not to be amended or reformed, nor enforced as an equitable lien in whole or in part, nunc pro tunc, against any of the Defendants, except said judgment debtors who have suffered default in this action, and said Defendant, Rachel Hasbrouck, who assented to said judgment; and it was further adjudged that said three judgments of February 13, 1857, which formed part of the consideration of the said judgment by confession for $6,200 and costs, be reinstated as of the day of their rendition, and that the cancellation of said judgments be vacated (except as to the judgment of $1,029.79, and costs, which judgment has been paid), and that the same, as against the parties Defendant in this action, be declared valid and subsisting liens as of the date of the rendition upon all the real property then owned by the said judgment debtors.

It was further adjudged that all the real estate described in the complaint, or so much as would satisfy the said two judgments, be sold by the sheriff of Sullivan county, upon the usual notice.

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That none of the Defendants were entitled to costs, but it was ordered that the Plaintiff have judgment therein for $47.02, costs of this action, to be collected out of said real estate.

The Defendants, William Murray, president of the Goshen Bank, Leveryn Hasbrouck, The Middletown Bank, James F. Bush, Edwin Foley, Ebenezer Bush, Gideon Walis, executor, and Sophronia Stewart, executrix of Levi Stewart, deceased, and Sophronia Stewart, appealed from the whole of said judgments to the General Term, and the Plaintiff appealed from every part thereof, except the portion which declares and adjudges that the judgments of the 13th of February, 1857, be reinstated and satisfied out of the real estate of said judgment debtors.

The General Term affirmed said judgments in all things, and ordered that no costs be allowed to either party as against the other upon said appeal. And the same parties, appealing to the General Term, severally appealed from said judgment to this Court.

The Supreme Court was in error in supposing it had not the power to amend and reform the judgment entered by confession upon the 27th of July, 1857.

This Court had occasion to consider that point in the case of Mitchell *v.* Van Buren (27 N. Y. 300), and affirmed this power in the Supreme Court. We then held that the Supreme Court had the power to amend the statement and confession, and that it possesses a jurisdiction of the same kind with that which it exercises in relieving against defaults and slips in practice. But we also held that its determinations as to such matters are not reviewable on appeal to this Court.

But it is now urged that, all the facts appearing upon the complaint and in the action, it was the duty of the Court to have declared the judgment of the Plaintiff of July 27, 1857, legal and valid. There is no question that it was competent for the Court to have granted the same relief upon a complaint in an action which it had the power to grant upon a motion. A motion is only a summary appeal to the equitable powers of the Court, and is everywhere treated as a summary and simple substitute for an action in equity (Chichester *v.* Cande, 3 Cowen, 39, note).

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Section 275 of the Code provides that if the Defendant has answered, the Court may grant the Plaintiff any relief consistent with the case made by the complaint, and embraced within the issue.

The Supreme Court therefore had the power to amend the statement and judgment, as we have seen. It also had the power to grant such relief as was consistent with the case made by the complaint, and embraced within the issue. A good cause of action is not destroyed by adding allegations of immaterial matter (Marquat v. Marquat, 2 Kern. 336; Eno v. Woodworth, 4 N. Y. 249; Wright v. Hooker, 10 N. Y. 51; Cobb v. Dows, ib. 335; Byxbie v. Wood, 24 N. Y. 607; White v. Madison, 26 N. Y. 117). The complaint in this action avers all the necessary facts to show that the Plaintiff is entitled to some relief, viz.: The consideration of the three original judgments, the recovery of said judgments, their dates and amounts, and facts establishing their validity, the jurisdiction of the Court to render such judgments, the application of the judgment debtors for the new loan, the negotiation and its final consummation, including the cancellation of the old judgments of record, and a statement of the exact amount due to the Plaintiff on the 27th of July, 1857.

The statement executed on that day, upon which the Plaintiff's judgment was entered, alleges that on that day the Defendants owed the Plaintiff the sum of $6,200, and that the same was for a debt justly due to the Plaintiff, and it states concisely the facts out of which that indebtedness arose. It avers that the whole amount mentioned was for money loaned by the Plaintiff to the Defendants. We think this statement is in conformity with the requirements of the Code (§ 383), as construed and explained by the numerous decisions of this Court (Lansing v. Carpenter, 20 N. Y. 447; Freligh v. Brink, 22 N. Y. 418; Neusbaum v. Keim, 24 N. Y. 325; Mitchell v. Van Buren, 27 N. Y. 300; Thompson v. Van Vechten, ib. 568; Read v. French, 28 N. Y. 285; Ely v. Cooke, ib. 365; Frost v. Koon, 30 N. Y. 428; Kirby v. Fitzgerald, 31 N. Y. 417; Kellogg v. Cowing, 33 N. Y. 408; Gandall v. Finn, decided in this Court, June, 1864; Curtis v.

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Corbitt, 25 How. Pr. Rep. 58). These cases abundantly sustain the correctness and validity of the statement in the present action, and establish the legality of the Plaintiff's judgment, and the sale made under it. But it is contended that the Plaintiff is concluded by the allegation in his complaint that this statement and confession were irregular and defective. We cannot concur in the soundness of this objection. A party is not estopped or concluded by a mistaken averment of the law in his pleading. The rule applicable to an averment of a fact has no force as to a statement of the law, as applicable to a certain state of facts. As every man is presumed to know the law, a mistaken assumption of what the law is, in a particular case, cannot be assumed to have misled the opposite party. No estoppel in pais arises when the facts are equally known to both parties, and the mistake of the party claiming to have been misled is one of law. There are no elements of an estoppel in the present case. The Defendants have not acted under any misapprehension occasioned by this averment and disclaimer of the Plaintiff. The Plaintiff's mistake was one of law, in assuming that the statement was irregular and defective. Had the Plaintiff understood the law, as we are bound to hold it, it is clear that the allegations of the complaint would have been different (De Lancy v. Ganong, 5 Selden, 9). In Wright v. Hooker (ubi supra) it was held that the very object of the new system of pleading was to enable the Court to give the judgment according to the facts *stated* and *proved*, without reference to the form used, or to the legal conclusions adopted by the pleader. But as already observed, the Defendants have not been misled by this mistake of the Plaintiff, and it is not thereby precluded from now asking such relief as the Court, upon the facts proved, shall be of the opinion it is entitled to. The Code confers ample power upon this Court to modify the judgment appealed from (§ 12).

We think the proper judgment for the Supreme Court to have rendered upon the facts found in this action was to have declared the Plaintiff's judgment of July 27, 1857, legal and valid, and a lien upon the real estate of Defendants therein, from the date of its docket; and that the sale, by virtue of the execution issued

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thereon, of the real estate of the said Defendants therein, was legal and valid, and that none of the parties were entitled to any costs as against the other in this action.

The judgment appealed from is reversed, and the record remitted to the Supreme Court to enter the judgment, which the Supreme Court should have entered as above stated, and which this Court directs to be entered.

JOEL TIFFANY,
State Reporter.

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THE BANK OF THE STATE OF INDIANA v. OLIVER BUGBEE.

Agency—General and Special.

Special agents cannot bind their principals beyond the scope of their special authority, and all persons dealing with them are bound to know the extent of their authority.

Special authority to an agent to buy corn, and to load it upon a vessel, does not authorize the agent to borrow the money, upon the credit of the principal, with which to pay for the same.

THIS action is for money lent and advanced by the Plaintiff to the Defendant, at his request.

The Defendant, in 1858, resided at the city of Buffalo, and was owner of the schooner Waurecau. Van Inwagen & Co. were grain brokers, residing and doing business at the city of Chicago.

The Defendant, in the month of July, 1858, sent his vessel to Chicago, and requested Van Inwagen & Co. to buy for him a cargo of corn, and load it upon his vessel. The Defendant did not provide them with funds with which to make the purchase.

They purchased the corn, and put it upon the Defendant's vessel, at Chicago. For the purpose of obtaining the money to make the purchase, they gave to D. R. Holt their draft upon R. S. King, of Buffalo, for the amount on time, acceptance waived, and the vessel's bill of lading of corn as security. In the bill of lading, "Van Inwagen & Co., agents and forwarders," were the shippers, and the corn was to be delivered as addressed in the margin. That address was "Ac't. D. R. Holt, care of R. S. King, Buffalo, N. Y." When the vessel arrived at Buffalo, the Defendant paid to King the amount of the draft, and received the cargo of corn.

In August of the same year, the Defendant again sent his vessel to Chicago, and wrote to Van Inwagen & Co. that he should want them to buy a cargo for her as soon as she should get there, and requested them to telegraph to him the prices of the different grades of corn and wheat. On the 19th of August they tele-

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graphed to the Defendant that his vessel had arrived at Chicago, that corn number one was selling there at sixty-nine cents per bushel, and also giving him the prices of other grades of corn, and of wheat. On the same day he telegraphed to them in answer: "Buy prime number one corn."

Van Inwagen & Co. thereupon made an arrangement with the Plaintiff to advance them the money, stating that it was to buy a cargo of corn for the Defendant. The Plaintiff advanced the money to Van Inwagen & Co., who with it bought a cargo of corn, at from seventy to seventy-one cents a bushel, and loaded it upon the Defendant's vessel, and took a bill of lading, in which "Van Inwagen & Co., agents and forwarders," were the shippers, and the address in the margin of which was, "Acc't H. Early, cash'r., care of R. S. King, Buffalo, N. Y." Van Inwagen & Co. delivered this bill of lading to the Plaintiff, together with their draft for the amount of the money advanced upon R. S. King, Buffalo, N. Y., payable twenty days after the date, acceptance waived.

The draft and bill of lading were dated August 21. The vessel sailed from Chicago on that day. On the 19th of August the Defendant wrote Van Inwagen & Co. a letter (which was not received until the 21st), saying that he thought he "could arrange with Cutler so he could draw on him at sight, and then he would save interest, and get a premium for his draft." And on the same day (August 21), the Defendant telegraphed from Buffalo to Van Inwagen & Co., at Chicago, "Did schooner load and leave to-day? Draw as before."

As soon as the Defendant was informed of the price at which the corn was bought, he repudiated its purchase; and, when the vessel arrived at Buffalo, he refused to have anything to do with the corn, by reason of its quality and price.

Mr. King, to whose care the corn was consigned, thereupon, under the directions of Mr. Early, the Plaintiff's cashier, sold it and paid over the proceeds of the sale to the Plaintiff, leaving unpaid of the money borrowed $3,008.57, and it is to recover this balance that this action is brought. At the trial the Plaintiff was nonsuited, the judgment upon which was affirmed by

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the General Term of the Superior Court of the city of Buffalo, in which Court the action was brought. The Plaintiff now appeals to this Court.

John Ganson for the Appellant.

Geo. P. Hibbard for the Respondent.

HUNT, J.—Van Inwagen & Co., of Chicago, Illinois, were the special agents of the Defendant, who resided at Buffalo, for the purchase of a cargo of number one corn, to be loaded upon the schooner Waurecau, at the former place. The authority was in writing, and its legal effect was fixed by its terms.

Van Inwagen & Co. were not the general agents of the Defendant, and the power to bind their principal extended no further than was given by the actual authority conferred upon them. They could not, like general agents, bind their principal, when acting within the ordinary scope of the business they were authorized to transact, although beyond their authority (1 Parsons on Cont. 40, 41, marg.; Story's Ag. §§ 105, 126; Nixon *v.* Palmer, 4 Seld. 398).

They were acting under precise written directions, limited to the particular transaction in question.

All persons dealing with them were, therefore, bound to know the extent of their authority, and to inquire into its limitations (Story's Ag. §§ 81, 83). In the language of Judge Cowen, in North River Bk. *v.* Aymar (3 Hill, 262): "The ground on which the rule rests is familiar. The appointee need not deal with the attorney unless he choose; and it is very reasonable that he should be bound to inspect the power, when in writing, or learn its language in the best way he can, when it is by parol. On becoming acquainted with it, he shall be holden to understand its legal effect, and must see, at his peril, that the attorney does not transgress the prescribed boundary in acting under it."

The authority to purchase the load of corn, by its terms, gave no authority to Van Inwagen & Co. to borrow the money with which to buy it.

There are, however, certain incidental powers accompanying the appointment of every agent which it is supposed may affect

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the present question. Thus, an authority to buy or sell goods, includes an authority to execute the proper vouchers therefor; an authority "to do the needful" in respect to the fulfilment of an award, carries the power to prepare a lease, if required by the award; an authority to sell a horse includes the power to warrant; a power to buy a thing without any statement at what price, includes the power to buy at any price; a power to sell goods includes a power to receive payment on the sale; a power to recover and receive a debt, includes a power to sue and a power to execute a release to the debtor; the possession of a bond by an agent is evidence of an authority to receive the money due upon it (Story's Agency, §§ 102, 103). So it has been held in Louisiana that an agent authorized to buy a cargo for his principal, if no other means or funds are provided, has an incidental authority to give notes, or draw and negotiate bills on his principal for the amount (Perrotin *v.* Cucullu, 6 Lou. R. 587. See, however, on this point, Paige *v.* Stone, 10 Metcalf, 160; Taber *v.* Cannon, 8 Met. 456; Webber *v.* Prest. of Wms. College, 23 Pick. 302).

In the present case, I think the authority to Van Inwagen & Co. meant simply that they should procure a cargo for this vessel by their own funds, or upon their own credit. It implied, further, that they should be paid for the entire service thus rendered, and that they, or the banker from whom the funds were obtained by them for the purchase, should hold the title to the property purchased, until it was paid for by the principal.

It is not necessary to decide that if Van Inwagen & Co. had purchased the corn of an owner, and had given to such owner a bill of exchange upon the Defendant for the amount, that the Defendant would not have been bound by that act. According to the case of Perrotin *v.* Cucullu (sup.), he would have been bound. According to the Massachusetts cases, he would not have been bound. The authority to be exercised, either under this principle or upon the principle as I have stated it, is mostly different from a power to the agent to borrow money for the purpose of making the purchase. In addition to the loss of the

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right to repudiate the purchase, if in violation of the instructions given, the temptation to the integrity of an agent, and the hazard of loss to the principal by his dishonesty or his misfortunes, are very different in the cases supposed.

The Appellant's proposition involves the broad ground that an authority to a broker to buy and load upon a vessel a cargo of corn or other produce gives to the agent the power to borrow the money upon the credit of the principal, with which to make the purchase. This unites a claim of experimental and dangerous powers.

When he borrows, the agent of right receives the money into his own possession. If he spends it, or loses it, or is robbed of it before a cargo is purchased, the principal is responsible for the bond, equally as if the cargo had been received by him. Many men will honestly discharge the duties of buying and selling merchandise, who will be less faithful in the application of moneys actually in their possession.

Particularly, the money, when received by the agent, would be deposited to his own credit, and drawn upon to pay for the cargo, when the loading was completed.

The money must be borrowed in advance of the purchase, and some time must elapse before the delivery can be completed. Is the principal to be subject to the hazard both of the honesty and the solvency of the agent during this period? If a commission of bankruptcy is sued out in the mean time against the agent, would the principal have a specific lien upon the funds thus borrowed, or would he occupy the position of a creditor simply?

Upon the principles held by the Court below, the cause is plain and open. None of these difficulties will arise.

I think they are sound. I do not find any authority in the books for the proposition claimed by the Appellants, and it would, in my opinion, be a dangerous innovation upon the principles of the law of agency.

If the custom of Chicago could in any event control the principles of law applicable to similar transactions, it certainly does not in the present case upon the evidence presented.

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The testimony of the merchants whose evidence was taken is uniform that, in the cases mentioned by them, the money is advanced upon the credit of the parties to the draft, and the security of the property purchased.

This is exactly what the Plaintiff had here.

No one witness testified to the existence of a custom for the agent to borrow money generally on the credit of the party desiring to purchase the cargo, or that would make the principal liable when the draft was not drawn in his name, or upon him, and when the property was not consigned to him.

An argument that this borrowing of money was ratified by the Defendant is drawn from the fact that he telegraphed, "Draw as before."

In the July preceding, the agents, Van Inwagen & Co., had drawn upon R. S. King, Buffalo, for the cargo then purchased. I do not discover any evidence in the case, or that was offered, which tended to show a knowledge by the Defendant that the purchase-money for that cargo was borrowed upon his credit.

The transaction, as presented to the Defendant, was in all respects the same in form as it would have been if Van Inwagen & Co. had themselves advanced, or themselves borrowed the money, and without reference to the credit of the Defendant. It cannot, therefore, amount to a ratification. It would have been hardly allowable that the jury should have given such effect to this despatch, if the Defendant had possessed that knowledge.

The Defendant had, on the 19th of August, written to Van Inwagen & Co. that he thought he could make a different arrangement with one Cutler, so that he could draw upon him at sight, and thus save interest and get a premium for his draft.

For some reason not explained, this arrangement was not perfected, and the Defendant thereupon telegraphs to his agents, "Did the schooner load and leave to-day? Draw as before." I think this was a simple notification that the proposed arrangement had fallen through, and that the agent should act without reference to it. The jury should have given it no other effect. In whatever form drawn, or from whose funds soever the draft

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should be taken, the interest to be saved, and the premium to be gained, would inure to the benefit of the Defendant.

All expenses were necessarily to be paid by him, including interest; and a premium on the draft, as well as the saving of interest, would go to its account, in the way of reducing the balance to be paid by him.

No inference is therefore to be drawn against the Defendant from these expressions in his letter.

Judgment should be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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D. W. TOMLINSON, RESPONDENT, v. C. G. MILLER, APPELLANT.

Statute of Frauds—Performance of void Contracts—Obligations—Evidence.

A contract which by its terms is void by the Statute of Frauds, if performed by a party who might have availed himself of the statute, imposes upon all the parties the same obligation as though the same had been legal and binding upon all parties.

A parol agreement,—by which fifteen hundred shares of stock were to have been transferred for a certain consideration to a party, who was to take five hundred for himself, and one thousand for another party,—though void under the statute, yet when the consideration has been paid and the stock has been transferred, the party receiving the stock for the other party cannot set up the statute as an excuse for not delivering the stock under such agreement.

J. Garison for Respondent.
Denio and Lanning for Appellant.

GROVER, J.—The first question to be determined is, whether the contract upon which this action is founded is void by the Statute of Frauds.

The contract was verbal, as claimed by the Plaintiff, and *as found* by the jury in determining the issues tried, and by the Court upon hearing, at Special Term, after verdict; and it was that the Plaintiff and Defendant should purchase of Patchin fifteen hundred shares of the Buffalo, &c., Railroad stock, for which they were to pay him fifteen thousand dollars of first mortgage bonds, and that the Plaintiff should take five hundred of said shares, and the Defendant one thousand.

That the Defendant should advance and pay to Patchin the five thousand dollars of bonds on account of the Plaintiff, who should repay thereafter said bonds to the Defendant. That in pursuance of said agreement the Defendant did, in a short time thereafter, deliver the bonds to Patchin, and received from him, in his own name, a transfer of the fifteen hundred shares of stock. The contract between these parties and Patchin, for the purchase from him of the fifteen hundred shares, was within the Statute of

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Frauds, and void (2 R. S. 317, § 3). This requires no argument. Had Patchin refused to perform the contract made with him, no action could have been maintained thereon by these parties against him for the breach. But Patchin, as appears from the facts found, did not refuse to perform, but did, in pursuance of the contract, transfer these shares to the Defendant. Whether the Defendant can retain the five hundred shares that the Plaintiff was to have, and shield himself under the Statute of Frauds, is quite another question. As to these latter, the Defendant was to act as the agent of the Plaintiff, and it was his duty to have taken the transfer of the five hundred shares in the name of the Plaintiff, so as to have invested him with the title thereto. In Ryan *v.* Dox (34 N. Y. 307), this Court held that where one agreed to purchase real estate for another upon a mortgage foreclosure sale, and in violation of such agreement made the purchase and took the title in his own name, he became a trustee for his principal, and that equity would compel him to transfer the title to the latter, upon performance of the terms of purchase.

This case does not require the Court to go to the full extent of Ryan *v.* Dox, in holding the Defendant bound to perform the contract with the Plaintiff.

In that case no bargain had been made for the purpose, at the time of the agreement between the parties, and it was not certain that any such would be made, as others were at liberty to compete for the purchase by bidding at the sale. In the present case the agreement for the purchase of the stock from Patchin by these parties was made. It is true that the bargain was not binding, but, when performed by Patchin, the effect upon the rights of these parties was the same as though it had been originally valid. The parties upon such performance by Patchin became entitled to their respective shares of stock, agreed to be sold by him to them, just as clearly as they would have been had the agreement with Patchin been reduced to writing, as required by the statute.

Had the agreement for the purchase of the stock from Patchin been originally valid, no one would have claimed that the Defendant could have held the Plaintiff's portion of the stock be-

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cause the whole was transferred to him. The statute makes void oral contracts for the sale of goods, chattels, things in action, for the price of fifty dollars and more.

The Plaintiff made no agreement with the Defendant to buy stock from him. The Plaintiff and Defendant agreed to buy of Patchin fifteen hundred shares—the Plaintiff five hundred, and the Defendant one thousand.

Patchin was the vendor of the entire amount to both. The Plaintiff did not agree to buy of the Defendant, nor did the Defendant agree to sell to the Plaintiff any stock.

Patchin was the vendor of both the parties to this action, and the Defendant having taken in his own name the shares agreed to be sold to and purchased by the Plaintiff, it is clear that, upon the principle of Ryan *v.* Dox, he took them as trustee of the Plaintiff, and that the Statute of Frauds is no obstacle in the way of a recovery. The Defendant's counsel insists that this action is for a specific performance of the contract between the parties, and that the delay of the Plaintiff in demanding such performance was so great that a Court of Equity will refuse to enforce such performance.

The delay was more than a year. There is no excuse for the delay shown that the Court in such a case would deem sufficient. In such cases the party must, as claimed by the counsel, show himself ready, prompt, and eager, and must suffer no unreasonable delay.

But this is not a case of specific performance. The Defendant is trustee for the Plaintiff of the stock. The action is brought to enforce this trust, and lapse of time short of the Statute of Limitations is not a defence to the action. The Court have a discretion in this class of cases to exercise in reference to any delay or other circumstances.

The trust being established, it is the duty of the Court to enforce it. The Defendant's counsel also insists that the Defendant did not receive the stock under the contract claimed by the Plaintiff.

That Patchin refused to transfer any stock to the Defendant,

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unless the latter would promise not to let the Plaintiff have any of it, and that the transfer was made pursuant to a new agreement. It is a sufficient answer to this position that the fact is found directly contrary to the counsel's position.

It is claimed that such finding is erroneous, because the uncontradicted testimony of the Defendant shows the fact to have been as claimed by counsel.

The answer to this is, that the credibility of the Defendant was a fair question for the determination of the Court.

He testified upon the principal questions of fact in the case, in direct conflict with the testimony of the Plaintiff and other witnesses, and with the finding of the Court thereon. It was no error in law not to give credit to his testimony, under these circumstances, upon the point in question. The only remaining question is, whether the letter of Patchin to the Plaintiff, written directly after the transfer of the stock to the Defendant, was competent evidence. This letter tended to prove the contract as claimed by the Plaintiff. It was not a part of the res gesta.

The bargain had been completely executed, so far as Patchin was concerned, when the letter was written. It was nothing more than the declaration of Patchin, and was not admissible. It was read in evidence upon the trial of the issues before the jury, and also upon the hearing before the Court. It was properly excepted to by the Defendant's counsel upon both occasions. Although this letter was improperly received in evidence, upon the trial of the issues before the jury, it does not follow that the verdict will be set aside. The question of setting aside verdicts upon issues ordered by Courts of Equity is not determined by the rules governing the granting of new trials in actions at law.

If upon examining the entire case the verdict accords with substantial justice, and satisfies the conscience of the Court, it will not be disturbed, although improper evidence was received. (Lansing v. Russell, 2 Com. 563; Forrest v. Forrest, 25 N. Y. 501.)

But the same rule does not apply to a trial before the Court.

If upon such trial illegal evidence is received, that may have prejudiced the party appealing, a new trial must be awarded,

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although the case is an equitable one. In such case it is impossible to determine what the decision upon the legal evidence only would have been.

The judgment should be reversed, and a new trial ordered, costs to abide event.

Judgment reversed, solely on the ground of the erroneous ruling of the Judge in admitting the letter in evidence—the other question discussed not being decided.

All the Judges concurred in opinion that the letter of Patchin to the Plaintiff was erroneously admitted. Four of the seven members of the Court who participated in the decision did not concur in the views expressed by Judge Grover on the other questions discussed in the opinion; and the Court accordingly declined to pass upon those questions.

Judgment reversed.

JOEL TIFFANY,
State Reporter.

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ANTHONY MASON v. BENJAMIN M. ANTHONY.

Usury—Estoppel.

An accommodation endorser of a note that is usurious in its inception, informing a purchaser of the note that the same is valid, and thereby inducing him to buy the note, will thereby be estopped from setting up its usurious character in an action against him on his contract of endorsement.

Estoppel in pais applies to defences of usury, as to other defences.

BOCKES, J.—Appeal from judgment of the Supreme Court.

The action was on a promissory note for $100, made by Wm. Jackson, Junior, to the order of the Defendant, and endorsed by him.

The defence was usury. The case was referred to a referee to hear and determine, who found in favor of the Defendant. The General Term, on appeal, reversed the judgment, and ordered a new trial; thereupon the Defendant appealed to this Court, stipulating that judgment absolute might be entered against him, in case the order appealed from should be affirmed.

The facts found and stated by the referee clearly present the only question involved in this case.

The referee found that the note was usurious in its inception, and was passed to the Plaintiff before due; that before the purchase by him, the Defendant was informed by the agent of the Plaintiff that the latter was about to buy the note, and desired to know if it was usurious; that the Defendant replied that it was not usurious; that there was a consideration paid for every dollar of it.

As a conclusion of law, the referee found and decided "that the representations of the Defendant, if made by the maker of the note, would have operated by way of an estoppel to prevent his availing himself of the defence of usury; but that an accommodation endorser could not, by his representations, charge the maker of a usurious note, and that a recovery against the endorser would in effect charge the maker."

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It has been settled in the Supreme Court, in numerous cases, that an estoppel in pais may be urged against the defence of usury, the same as in any other case where the doctrine of estoppel in pais is applicable. The decisions in that Court are numerous and uniform (Ferguson *v.* Hamilton, 35 Barb. 427; Chamberlin *v.* Townsend, 26 Barb. 611; The Merchants' Bank of Brooklyn *v.* Townsend, 17 How. Prac. Rep. 569; Truscott *v.* Davis, 4 Barb. 495; Dowe *v.* Schutt, 2 Denio, 621). The rule was also well settled in the late Court of Chancery (Holmes *v.* Williams, 10 Paige, 326; Mitchell *v.* Oakley, 7 Paige, 68). Also in the Superior Court (Clark *v.* Sisson, 4 Denio, 408). It is the same in Connecticut (Roe *v.* Jerome, 18 Conn. 138; Middletown Bank *v.* Jerome, 18 Conn. 443), and perhaps in some other States. The estoppel, too, has often been held to be available against an endorser as well as maker. The distinction marked by the referee, and on which he based his decision, has never been recognized in any reported case, nor is it sound in theory. There can be no reason why an endorser should not be estopped by his representation that the note is valid business paper, as well as the maker. The consequences to the purchaser are the same in both cases.

There is a question, however, not considered in any of the cases, which lies at the foundation of the rule, apparently so well established in the Supreme Court. It is this: whether the doctrine of estoppel in pais should have application to the defence of usury. This question is worthy of consideration, and is still open in this Court. Judge Denio seems to have had it in mind when discussing the subject in The Bank of Genesee *v.* The Patchin Bank (13 N. Y. 316). In speaking of the rule he says: "This is carrying the principle of estoppel to the length of protecting a transaction prohibited by a positive law, founded upon considerations of public policy." He adds, "It is not necessary to affirm that doctrine in this case;" hence he refrained from entering upon its examination. The point was commented on in Ferguson *v.* Hamilton (35 Barb. 427), and suggestions were made, here unnecessary to repeat. On careful reflection and discussion we are

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of the opinion that an estoppel in pais may be urged against the defence of usury.

The same considerations of morality and public policy exist in that as in other cases where the doctrine of estoppel obtains. Nor should we, on other than grounds of absolute necessity, disturb a rule which has so long controlled the business affairs of the country, and been relied on as settled law. The order appealed from must be affirmed, and the Plaintiff is entitled to judgment absolute, pursuant to the stipulation given on the appeal.

All affirm.

JOEL TIFFANY,
State Reporter.

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GEORGE WHITEHEAD, RESPONDENT, v. ELIJAH B. ALLEN ET AL., IMPLEADED, APPELLANTS.

Pleading—Demurrer—Cause of Action.

In actions brought under the statute of 1849, as amended in 1853, entitled "An act in relation to suits by and against joint-stock companies and associations," the judgment recovered against the company is not the foundation of the action against a stockholder of the company on failure to satisfy such judgment by execution against the company. The action authorized by the 4th section of the act, against individual stockholders in such cases, is based upon the original cause of action against the company; and in such proceeding the original cause of action must be stated in the complaint.

PARKER, J.—This action was commenced under the Statute of 1849, entitled "An act in relation to suits by and against joint-stock companies and associations," as amended in 1853, against the Appellants and several other persons, alleged to be members of a joint-stock association, after judgment and execution against the company. The complaint alleges that the Defendants were, during the year 1857, members of, and shareholders in, a joint-stock company or association, duly organized, and styled and known as "The Ontario and St. Lawrence Steamboat Company." That during that year, and while the Defendants were members thereof, the company became indebted to the Plaintiff, for goods sold and delivered to its officers and agents for its use and benefit, in the sum of $162.51. That he commenced an action against the company on the said demand, by the service of a summons and complaint on its president, and on the 26th of December, 1857, obtained a judgment for $165.22 damages, and $12.89 costs, making in all $178.12. That on the same day an execution upon such judgment was issued and delivered to the sheriff of St. Lawrence county, requiring him, &c. (in the usual form); that the execution has been returned wholly unsatisfied, and the judgment remains wholly unpaid. Judgment for $178.12, with interest from December 26, 1857, was demanded.

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To the complaint these Defendants demurred, on the ground that the "complaint does not state facts sufficient to constitute a cause of action."

The Plaintiff applied to a Justice of the Court, at chambers, for judgment against these Defendants upon the demurrer, for the frivolousness thereof. The motion was granted, and final judgment ordered in the action against these Defendants for the sum demanded in the complaint, which was thereupon entered. From this judgment the Defendants appealed to the General Term, where it was affirmed, and from the judgment of affirmance they now appeal to this Court.

The question brought here by the appeal is upon the issue of law raised by the demurrer. Does the complaint state facts sufficient to constitute a cause of action? (Manning v. Tyler, 21 N. Y. R. 567; The East River Bank v. Rogers, 7 Bosw. 493). By the first section of the Act of 1849, "any joint-stock company or association, consisting of seven or more shareholders or associates, may sue and be sued, in the name of the president or treasurer for the time being of such joint-stock company or association; and all suits and proceedings so prosecuted by or against such joint-stock company or association, and the service of all process or papers in such suits and proceedings on the president or treasurer for the time being of such joint-stock company or association, shall have the same force and effect, as regards the joint rights, property, and effects of such joint-stock company or association, as if such suits and proceedings were prosecuted in the names of all the shareholders or associates, in the manner now provided by law" (Sess. Laws 1849, chap. 258, § 10).

The fourth section of this act, as amended in 1853, enacts as follows: "Suits against any such joint-stock company or association, in the first instance, shall be prosecuted in the manner provided in the first section of the said act; but after judgment shall be obtained against any such joint-stock company or association, as above provided, and execution thereon shall be returned unsatisfied, in whole or in part, suits

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may be brought against any or all of the shareholders or associates individually, as now provided by law" (Sess. Laws 1853, chap. 153).

The joint-stock companies mentioned in these acts are not corporations, but mere partnership concerns, in which the shareholders are partners, and all are individually liable as such. These statutes, however, modify the common law in its application to them: first, in respect to the mode of suing the company, and the effect of judgments against it thus obtained reaching the joint property of the association only; second, in suspending the right to sue the partners individually for the liabilities of the company until redress has been thus sought against the property of the association and has failed; third, in allowing actions, after such failure, against any or all of the individual partners—in the language of the act, "as now provided by law"—that is, such actions as might have been brought if the act in question had not been passed. It seems to me that we cannot, from these enactments, infer the intent to authorize actions against the individual partners upon the judgments so to be obtained against the associations. No action can be brought against the individual partners upon any demand against the company, until one has been first brought against the company upon the sum demanded, is the clear declaration of the statute. The cause of action, therefore, on which the individual partners are to be sued, is the same as that on which the association was sued. The judgment against the association is not a judgment against the individuals, either in form or effect. It is a statutory judgment, and the statute declares what its effect shall be—that is, as regards the joint rights, property, and effects of the joint-stock company—the same as though it were a judgment obtained in an action brought against the company in the ordinary way. As against the individual partners it has no force, as a judgment, beyond the effect given it by the statute, and is not a substantial cause of action against them (Bailey v. Bancker, 3 Hill, 192).

In bringing an action thus against the individual partners, the complaint should set forth such facts as are sufficient to show the

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original cause of action against the association, in addition to those made necessary by the act, showing the attempt and failure to collect the demand, by judgment and execution, out of the property of the association.

In the case at bar it would seem that the pleader proceeded upon the idea that a recovery was to be had upon the judgment against the association. This demand of judgment is for the amount of that judgment, damages, and costs. The Defendants' counsel claim that, the complaint being upon the judgment, the action cannot be sustained.

If the pleader, in setting forth his cause of action, does, in fact, show a good cause of action, although not the one intended, his pleading will, nevertheless, be sustained upon demurrer; for it is to be measured, not by his view of the law, but by the law itself. We must look, then, into the complaint to ascertain whether it sets forth, by proper allegations, a cause of action, independent of the judgment against the association.

It shows the Defendants members of the association, and, besides the proceedings to judgment against the association, and the return of the execution unsatisfied, alleges that, during the time when they were such members thereof, "the said company became indebted to the Plaintiff for goods sold and delivered to its officers and agents, for its use and benefit, in the sum of one hundred and sixty-two dollars and fifty-one cents." This is the whole statement of facts. Do they constitute a cause of action?

I confess I am quite unable to see a cause of action in the statement. The fact that the company, in 1857, became indebted to the Plaintiff in a sum named for goods sold and delivered to its officers and agents for its use, does not make out a present right of action against the company, without the further fact of a present duty and a breach of it. "The breach of the contract," says Chitty, "being obviously an essential part of the cause of action, must in all cases be stated in declaration" (1 Ch. Pl. 365). This, in the complaint under consideration, is wholly wanting. It does not even allege an *existing* indebtedness.

In Allen v. Patterson (3 Seld. 476) the complaint was as

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follows: "The Plaintiffs complain against the Defendant for that the Defendant is indebted to the Plaintiffs in the sum of $371.01, for goods sold and delivered by the Plaintiffs to the Defendant, at his request, on, &c., . . and the Plaintiffs say that there is now due them from the Defendant the sum of $371.01, for which sum the Plaintiffs demand judgment." Upon demurrer this Court held the complaint good, Judge Jewett, who delivered the opinion of the Court, remarking that it contains every statement of fact necessary to constitute a good indebitatus count in debt, according to the mode of pleading before the Code. But in that case the allegation that "there is now due the Plaintiffs $371.01," plainly expressed the fact that the purchase price of the goods had become due and remained unpaid; and particular stress was laid by the Court upon that allegation.

Chitty, in speaking of the indebitatus count in debt, says: "The indebitatus count states that the Defendant," &c., "was indebted to the Plaintiff in a named sum of money, 'for goods sold,' and although it has been usual to conclude each count with the allegation that 'by reason of the sum of money being unpaid, an action had accrued to the Plaintiffs to demand and have the same from the Defendant, being parcel of the money above demanded,' yet that allegation is unnecessary, and the usual breach at the end of the declaration will suffice" (1 Ch. Pl. 394, 7th Am. ed.). I am not aware of any case, or any book of forms, before or since the Code, which dispenses with the allegation of a breach of the contract or duty on which the action is founded. Indeed, when the action is founded upon the contract, obligation, or duty of the Defendant, the very gist and essence of the cause of action is the breach thereof by the Defendant. Unless a breach is alleged, therefore, no cause of action is shown.

I am unable to avoid the conclusion that the demurrer is well taken, and that the judgment of the Court below is erroneous, and should be reversed.

All concur, except GROVER and HUNT, JJ.

Reversed.

JOEL TIFFANY,
State Reporter.

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JOHN W. MATTICE, Respondent v. WILLIAM G. ALLEN and Others, Appellants.

Statute of Frauds—Compliance—Part payment.

A parol contract is not taken out of the Statute by an agreement to apply an existing debt between the parties, as payment of the property contracted for. There must be some distinct act of the parties, in affirmance of the contract, at the time the agreement is entered into.

This action was brought to recover damages of the Defendants for the breach of an alleged agreement made by them with the Plaintiff, to purchase of him a quantity of barley for a sum exceeding fifty dollars. The only question involved is whether the contract was valid, or whether it was void by the Statute of Frauds. The only ground upon which it is claimed there was a compliance with the statute is, that a part of the purchase-money was paid upon the making of the contract. The facts upon which this claim is based are, that before the making of the contract, the Plaintiff borrowed of the Defendants' agent forty dollars of the money of the agent, and agreed that, if he thereafter sold his barley to him, the money so borrowed should apply upon the purchase price, and if he did not sell he would repay the money. Several days afterward the agreement to sell the barley was made by the Plaintiff with this agent, and they at the same time agreed, verbally, that the forty dollars so borrowed should be applied as payment upon the price.

The Defendants' counsel, upon trial before the referee, moved for a nonsuit upon the ground, among others, that the contract was void by the Statute of Frauds, no part of the purchase-money having been paid at the time of making the contract. The motion was denied by the referee, who afterward made a report in favor of the Plaintiff, which was affirmed, upon appeal, by the Supreme Court sitting in the Seventh District, from which judgment the Defendant appealed to this Court.

A. P. Ferris for Respondent.

D. Rumsey for Appellants.

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GROVER, J.—The precise question presented by the Defendants' motion for a new trial was decided against the Plaintiff by this Court, in Brabin v. Hyde (32 N. Y. 519). In that case the purchaser had a debt of upwards of two hundred dollars against the seller, and made a verbal contract to purchase from him a mare and colt, for one hundred and seventy-five dollars, and to apply the purchase-money in payment of the debt. This Court held that the agreement so to apply the purchase price was not a payment at the time of making the contract, within the last clause of § 3, 2 R. S. 136. In the present case, the Defendants' agent, who made the agreement to purchase of the Plaintiff his barley, had a debt against him of forty dollars, and agreed at the time that this debt should apply as payment upon the barley. It is manifest that the circumstance of the debt being due the agent, instead of the Defendants, can make no difference, at least favorable to the Plaintiff. The referee should therefore have held that the contract was void by the Statute of Frauds, and on this ground granted the motion for a nonsuit.

There was no proof given subsequent to the denial of the motion tending in any respect to show the contract valid, and, therefore, the Defendants' exception to the erroneous ruling was not obviated. The reason of the rule held in Brabin v. Hyde is, that mere words will not satisfy the requirement of the statute. That, in addition, some act of the parties is required, showing by such act their assent to the contract. The delivery of the note of a third person, or anything else agreed to be received in payment, in whole or in part, is such act as is required. When a debt due the purchaser from the seller is to apply as payment, the delivery by the former to the latter of the evidence of the debt for cancellation, or the delivery and acceptance of a discharge of the debt, will constitute such act, and render the contract valid.

The counsel for the Respondent insists that the agreement of the parties to apply the debt in payment discharges the debt, and therefore it must be regarded as a payment upon the contract, and cites Davis v. Spencer (24 N. Y. 386) in support of the

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position. It is true that where mutual debts exist, an agreement by the parties to apply the same in satisfaction of each other will operate as satisfaction of both, as held in Davis v. Spencer. But that doctrine has no application to the present case, for the reason that the statute makes void the entire agreement, when there was nothing but mere words.

That is clearly the present case. The judgment appealed from must be reversed, and a new trial ordered, costs to abide event.

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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REINOLD SCHNEIDER, RESPONDENT, v. BENJ. B. M. LANE AND OTHERS, APPELLANTS.

False Imprisonment—Corporation Ordinance—Powers of Metropolitan Police Board.

When the Defendant justifies the keeping in custody the Plaintiff from evening until the morning, under that rule of the Metropolitan Police Board which authorizes the detaining of persons charged with the commission of felonies and misdemeanors, he must show that the alleged accusation was such as is denominated a felony or misdemeanor by law. The accusation that he had violated an ordinance of the Common Council of the city of Brooklyn is not sufficient.

H. B. Hubbard for Appellants.
J. W. Gilbert for Respondent.

DAVIES, CH.J.—The Plaintiff was arrested at about half-past five o'clock in the afternoon of the 21st day of February, 1861, by Jeremiah Clark, a policeman of the city of Brooklyn, for riding his horse on the sidewalk on 9th street, between 3d and 4th avenues, in the presence and view of the officer, and in violation of one of the ordinances adopted by the Common Council of said city of Brooklyn. The Defendant, Mr. Lane, was the captain, and the Defendant, Dufour, the sergeant of the Metropolitan Police force of the district in which such arrest was made, and, as such, had charge of the station-house in said district. Clark took the Plaintiff to the station-house, and handed him over to the custody of the Defendants, when he was locked up and detained until the next morning, when he was taken by officer Clark before a magistrate, and, upon a trial, he was convicted, and paid his fine, and was thereupon discharged.

The Plaintiff brought this action to recover damages for his alleged false imprisonment, and the jury rendered a verdict in his favor, and judgment thereon was affirmed at the General Term. The Defendants in their answer set up the breach of the city ordinance in presence and view of the officer, his arrest therefor, and commitment to them for safe-keeping, and claim the right,

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as officers of the Metropolitan Police force, to detain him for hearing before the police magistrate. The city ordinance was produced and proved, and its violation by the Plaintiff, in the presence and view of the officer, was not controverted.

The provisions of the ordinance violated were in these words:

"§ 11. No person shall drive, back, or lead any horse, or cart, or wheel-carriage, on the footpath or sidewalk of any street or avenue."

It did not clearly appear what the penalty prescribed by the ordinance for its violation was, and it does not otherwise appear than by the fact that a fine was enforced for such violation, upon the conviction of the offender. It may safely be assumed, therefore, that the penalty for the violation of the ordinance was of a pecuniary character solely. If otherwise, it was incumbent upon the Defendants to have shown it.

It appeared from the evidence of James H. Cornwall, who was at the time the police magistrate in Brooklyn, that the usual hours during which the police courts were open for the transaction of business at the City Hall in that city were from nine o'clock A.M. to four P.M. during each day. That the witness then resided within the city, at No. 101 Clermont avenue, and Justice Blatchley, another magistrate, resided one mile and a half nearer the station-house, where the prisoner was detained, than the witness. The witness also testified that he was in the habit of transacting business at the different station-houses. The Defendants put in evidence the following rules of the Police Board:

"General Rules, § 15. All persons who shall be arrested during the time the police courts are directed to be kept open shall be taken immediately to the police court in the police district to which the policeman who may make the arrest may be attached, and all persons arrested at any other time shall be conveyed in like manner to the police station-house of the policeman who may make the arrest.

"§ 28. When a person accused of having committed a felony, or misdemeanor, is brought to the station-house, when the police

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courts are not open, the officer on duty, to whom the complaint is made, is only to ascertain from the person preferring it that the act charged is a felony, or other offence for which a person can lawfully be detained, and that there is reasonable ground for the complaint against the party accused. He will then enter the name of the prisoner on the blotter, and cause him to be detained in the station-house until the next morning. He will also enter the name and address of the complainant and witnesses on the blotter, and take the necessary measures to insure their appearance before the magistrate in the morning.—Note to the rule: Captains, sergeants, policemen, or doormen, are not authorized by law to discharge any prisoner from custody.

"§ 86. The captain in each precinct shall have the general charge and inspection of the police station-house and precinct to which he is detailed, and the sergeants who are in their regular order to have charge of the same will be held responsible for the cleanliness, general condition, and good order of said station-house and precinct.

"§ 98. He shall cause to be entered in a book, to be kept at the station-house, the name at full length of every person detained by him, the time of his arrest, the offence with which he may be charged, the name and residence of the complainant, and the name of the officer or policeman who arrested said person."

It was in pursuance of the authority conferred upon the Defendants by these regulations that they sought to justify the detention and imprisonment of the Plaintiff. When the evidence closed, the Judge instructed the jury that the imprisonment of the Plaintiff was without legal authority, and the only question for them to determine was the amount of damages the Plaintiff should recover for the detention.

To this charge and instruction the Defendants' counsel excepted. There was another exception to the refusal of the Judge to charge as requested, and to a further charge made by him; but, in the view I take of this case, such exceptions need not be considered. If I am correct in the result at which I have arrived, in consider-

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ing the exceptions already referred to, such result is decisive of the case at bar.

No question is made as to the power of the Metropolitan Police Board to make and ordain the regulations already referred to and quoted.

By the 28th section, a person accused of a felony, or misdemeanor, when the police courts are not open, is to be brought before the captain of the police, and, if he is satisfied that there is reasonable ground for the complaint, he may cause the party accused to be detained until the next morning, and it would be the duty of the sergeant of the police, having charge of the police station, to obey such order, and detain the party accordingly.

But it is to be observed that this authority is conferred only in the event that the party accused is charged with a felony or misdemeanor, and the captain shall be satisfied, upon inquiry, that there is reasonable ground for the charge. In no other event or contingency is the authority or detention to be exercised. Now, there is not a scintilla of evidence in this case that the Plaintiff had committed a felony or a misdemeanor, or that he was charged with having committed either. It appears the charge was that, in the presence and view of the complainant, Clark, he had violated an ordinance of the Common Council of Brooklyn, by riding his horse upon or across a sidewalk in that city. It nowhere appears, and we are not at liberty to assume, that this act was either a felony or misdemeanor. If it had been, it was essential to the Defendants to have availed themselves of the immunity and protection afforded by these regulations of the Metropolitan Police Board, and to have shown that the charge made against the Plaintiff was a felony or misdemeanor. They had no legal right or authority to detain the Plaintiff in the station-house upon any of the charges or complaints.

The charge of the Judge at the trial was clearly correct, and the judgment should be affirmed, with costs.

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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JOHN OWEN AND GEORGE F. BELLOWS, RESPONDENTS, v. JANE F. CAWLEY, APPELLANT.

Married Woman—Equitable lien—Evidence—Admissions of Agent.

Under the laws of the State, conferring upon married women the rights and powers of femes-sole in respect to their separate estate, they are liable to fulfil their contracts in the management of such separate interests.

A married woman employing an attorney in relation to her separate interest, is liable to pay the usual fees, the same as other parties.

APPEAL from the Supreme Court. The action was for professional services rendered to a married woman, for the benefit of her separate estate; and the relief sought was, that the same be declared an equitable lien on such separate estate, and that so much thereof as might be necessary be appropriated to the satisfaction of the claim.

On the first hearing, before Judge Mitchell, on the report of a referee, judgment was rendered for the Plaintiffs for a greater amount than on the last trial. That judgment was reversed at the General Term, for the reasons appearing in the report of the case (36 Barb. 52).

The order of reversal procured on that occasion, provided that the evidence taken on the first trial should stand as evidence on the new trial, and that either party should be at liberty to add such further evidence as they might be advised. Neither party appealed from this order, and, so far as appears, it was mutually acquiesced in, and acted upon by both.

On the last hearing, before the same referee, judgment was recovered by the Plaintiffs, pursuant to the prayer of the complaint, the amount of the lien charged on the Defendant's estate being adjudged to be $61.25, with interest from the 30th of May, 1859, and costs.

The Defendant appealed to the General Term of the Supreme Court in the First District, and the judgment was unanimously affirmed, the opinion of the Court being delivered by Mr. Justice Sutherland.

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The following facts were expressly admitted in the verified pleadings, as amended:

1. That the Plaintiffs were attorneys and counsellors, in partnership in the city of New York.

2. That the Appellant, Jane F. Cawley, was the wife of the Defendant, Samuel B. Cawley.

3. That she was possessed in her own right, separate from her husband, of a large amount of real and personal property in this State, including a house and lot in Queens county, and a store of goods in New York, in which she had conducted the ship chandlery business from a period before the first of January, 1858, down to the commencement of the suit; and that in the course thereof, in the years 1858 and 1859, and prior to the commencement of this action, she had various sums due and owing to her by various individuals, ships, and vessels.

4. That during these periods, and previous thereto, her husband carried on the business as her agent, and as such managed and conducted the same in all its details.

The complaint also alleged the professional services and disbursements of the Plaintiffs, at her request and that of her agent, the amount due therefor, and the fact that such services were rendered and such disbursements made on the credit and for the benefit of her separate estate. These allegations were put in issue by the answer.

The referee found, among other things, as matter of fact, that all the services alleged were rendered, and that all the facts stated in the complaint were true, with certain exceptions as to amounts, &c., not material to be stated. He found, as matter of fact, that all the services embraced in the amount he allowed were rendered for the benefit of Mrs. Cawley and her separate estate; that she employed the Plaintiffs to render them, through the agency of her husband, to whom she had intrusted the whole management of the business of her separate estate, having full confidence in his ability to act for her, and not restricting his authority in any way, but *requesting* him "to let law alone, *if possible*, and to do a cash business." This request was not made

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known to the Plaintiffs. The prosecution of each of the actions and proceedings was expedient, and there was no prospect that the demands would be collected without suit.

The Defendant attempted to establish a special agreement that no compensation should be made for services which did not result in collecting the money; but the referee found, as matter of fact, that no such agreement was made.

A question was raised whether some of the proceedings, which were taken in the names of nominal assignees of the Appellant, for particular reasons disclosed by the evidence, were not really for the benefit of such assignees; but the referee found, as matter of fact, that they were so taken for the benefit of Mrs. Cawley and of her separate estate, and by the direction of the husband, as her agent.

He also found that each of the claims prosecuted by the Plaintiffs arose out of sales by her husband, as her agent, of goods belonging to her separate estate, except in a single instance. In that case the claim was for goods sold by J. C. Sleight & Co., the previous proprietors of the store, and which, with other goods and demands, had been absolutely assigned to her, in payment of a debt for advances from her separate estate.

The Defendant attempted to prove a subsequent agreement between Sleight and his creditors, for the purpose of showing that the transfer to her was only colorable; but the referee found that such agreement was not satisfactorily proved.

In the course of the trial several questions arose as to the admission of evidence; and exceptions were also taken to the refusal of the referee to dismiss the complaint, and to his ultimate conclusions of law upon the facts as found.

D. McMahon for Appellant.

Thomas G. Shearman for Respondents.

PORTER, J.—The principal question in this case arises under the statutes of 1848 and 1849, in relation to the property of married women. The primary purpose of these acts was to enable every feme covert to hold property in her own right, without the inter-

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vention of trusts or marriage settlements. It was neither their design nor effect to place such property beyond the reach of all remedial process, nor to secure to the wife a mere dormant and barren title, with none of the usual incidents of the jus disponendi. Under their operation she succeeded to the right which a trustee could have exercised under the old law, to protect the interest thus vested by all the usual agencies, and to enforce and defend her claims in the tribunals of law and equity. While her antecedent disabilities arising from the conjugal relation were not wholly removed, they were necessarily so far modified as to secure her in the beneficial enjoyment of the new interests she was permitted by law to acquire (Yale *v.* Dederer, 18 New York, 272, 278; 22 id. 451; Buckley *v.* Wells, 33 id. 522). She was still left without capacity to bind herself personally by a naked promise, note, or bond; but she could exercise the right of an owner, by subjecting her separate estate to charges in equity for services rendered, at her request, for the benefit of such estate; or she could dedicate it to other purposes if she chose to exercise her intention by a formal and deliberate pledge. The mere fact, however, that she was the owner of a separate estate did not affix to it, under these acts, a liability in equity in respect to her engagements at large. Such a lien could only be deduced from an express or implied agreement to that effect on her part, or from some equivalent obligation resulting from her acts by operation of law. Where services are rendered for a married woman by her procurement, on the credit and for the benefit of her separate estate, there is an *implied* agreement and obligation, springing from the nature of the consideration, which the Courts will enforce by charging the amount on her property as an equitable lien (18 New York, 276, 282, 284; 22 id. 460). Where a charge is created by her own *express* agreement, though for a purpose not beneficial to her separate estate, or even for the sole benefit of her husband, she is bound in equity by the obligation which she thus deliberately chooses to assume (18 New York, 276, 283; 22 id. 451).

It was at one time a mooted question in the Courts whether,

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under the statute above referred to, and prior to the act of 1860, the common law disabilities of the wife were so far modified as to permit her to manage her estate, through the intervention of agents and employees; but it is now entirely settled that she acquired, in this respect, the usual rights incident to absolute ownership, and that she could avail herself of any agency, even that of her husband, with the same effect as if they were not united in marriage (Knapp *v.* Smith, 27 New York, 277, 280; Buckley *v.* Wells, 33 id. 518, 532; Smith *v.* Sweeney, 35 id. 294, 295; Draper *v.* Stouvenal, 35 id. 513; Abbey *v.* Deyo, 44 Barbour, 382).

In this case the referee finds, as matter of fact, that the Plaintiffs were employed by the Appellant, through her authorized agent, to whom she had entrusted the entire management of her business and estate. She was as effectually bound by the act done in her name as if she had personally engaged the professional services of the Respondents. She accredited her husband to the public as her general agent in all that pertained to her business; and, as the Plaintiffs had no notice of any private restrictions upon his authority, the fact that any such were given would have been unavailing, even if she had succeeded in proving it (Wademan's Bank, 11 Wendell, 87; Johnson *v.* Jones, 4 Barbour, 369, 373).

It is also found, as matter of fact, that all the services in question were rendered for Mrs. Cawley and for the benefit of her separate estate. Her counsel insists that such of them as appertain to suits in which there was a failure to collect the amount of the claims, should not be deemed beneficial in their character. No such distinction can be maintained. The rule of equity under which the estate of a married woman is subject to a charge, in respect to services rendered for its benefit, has reference to the subject-matter and nature of such services, and not to the contingent and ultimate gain or loss of the party procuring them. A builder who, at the request of a feme covert, erects a dwelling on her land, performs a service for the benefit of her estate, within the meaning of the rule; and its nature would not be changed

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though the edifice should afterward be destroyed by fire. An employee who tills her land for hire, has an equitable claim to compensation; and, if he discharges his duty faithfully, he has a remedy for his wages, though her fields should prove unproductive. In this case the claims in question formed a part of the separate estate, and the services were for its direct and immediate benefit (Dillaye v. Parks, 31 Barbour, 132). The Appellant preferred not to prosecute the suits in person; and the attorneys who conducted them in her behalf, having served her with suitable skill and fidelity, are not responsible for any defects in her proof, or for the inability of her debtors to respond to their obligations. It follows from these views that, on the principal questions involved in the case, the referee was right in his conclusions.

The Plaintiffs were properly allowed to prove the admissions of the Appellant on the previous hearing. They constituted a portion of the evidence which, under the order entered at the General Term, either party was entitled to read; and this right was exercised on the second trial by both. Where an unqualified admission is made in a pending cause, whether by stipulation of the attorney, or as matter of proof on the hearing, it cannot be retracted on a subsequent trial, unless by leave of Court. Its cause for granting such leave was shown, and there was no allegation of mistake, imposition, or surprise (People v. Rathbun, 21 Wendell, 543, 544; Elton v. Larkins, 24 Eng. Comm. Law, 372; Doe v. Bird, 32 id. 416; Langley v. Earl of Oxford, 1 Meeson & Welsby, 508).

It is claimed, in behalf of the Appellant, that the referee should not have permitted the reading, on the new trial, of the evidence on the former hearing, as provided in the order of reversal. We see no reason why the parties are not concluded by that order, in which both of them seem to have acquiesced. No appeal from it has ever been taken, no motion was made to modify it, and both parties have acted under it (Vail v. Remsen, 7 Paige, 207). It was read in evidence without objection, and no question in regard to it was raised before the referee. Portions of the proof introduced under it were objected to, on other and specific grounds;

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but the position now taken, that the whole was inadmissible, was not even suggested on the trial. Upon the facts disclosed by the case, we do not think the objection tenable; but, if it had been well founded, it would be too late to raise it on appeal (Newton v. Harris, 2 Selden, 345; Judd v. O'Brien, 21 New York, 190).

In the course of the trial objections were taken to the proof of the acts and declarations of the Defendant's agent, in relation to the legal proceedings conducted by the Plaintiffs. They constituted a part of the res gestæ; and as his agency was conceded, they were admissible as acts and declarations of his principal (McCotter v. Hooker, 4 Selden, 503; Fleming v. Smith, 44 Barbour, 554). Other grounds of error are alleged, but they seem to us plainly untenable.

The judgment should be affirmed, with costs.

PARKER, J.—The cause of action in this case is the services of the Plaintiffs as attorneys and counsellors-at-law, performed, as is alleged, for the Defendant, Jane F. Cawley, who is the wife of the other Defendant, and for the benefit of her estate.

It appears from the findings of the referee that the Plaintiffs (upon the retainer of Samuel B. Cawley, the husband, to whom his wife, Jane F. Cawley, had entrusted the management of the business of her separate estate), in the years 1858 and 1859, rendered services in the bringing of suits and other proceedings for the collection of demands belonging to such separate estate, which services the referee found, as matter of fact, were rendered for the benefit of said Jane F. Cawley and of her separate estate; whereupon he ordered judgment for the balance which remained due therefor.

It is contended, on the part of the Defendant, that inasmuch as she was engaged in business as a sole trader, and the demands, or most of them, which the Plaintiffs were employed to collect, arose from sales of property in such business, her separate estate was not liable to be charged for the Plaintiffs' services, because, before the act of 1860, she could make no valid contract as such sole trader.

The question of her power to contract as a sole trader is not

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involved in this case. The demands having been either assigned to her, or having arisen from sales of her property, clearly belonged to her separate estate (Knapp v. Smith, 27 N. Y. R. 277); and she could maintain suits thereon in her own name (Code, § 144). For the beginning of such suits she could inform her husband to employ an attorney (Buckley v. Wells, 33 N. Y. R. 518; Knapp v. Smith, supra), and the referee was right in holding that the services were performed for the benefit of her separate estate, without reference to the question whether the suits were or were not successful. This latter circumstance is not to determine whether the services were for the benefit of the estate. If the service was rendered *on behalf* of the estate, for the purpose of benefiting it, that is a sufficient compliance with the requirement of the law in that respect.

The evidence of the acts and the declarations of the husband, in the employment of the Plaintiffs to perform the services, were admissible, his agency having been admitted by the Plaintiffs, and also shown by independent evidence. They were admitted only for the purpose of showing the nature of the service which he employed the Plaintiffs to render on Mrs. Cawley's behalf.

The Defendant had no right to withdraw any admissions made upon the former trial, for the reason that the order for a new trial obtained by her, and under which she proceeded to this trial, directed that the evidence taken on the former trial should stand as evidence on the new trial.

The new trial was properly before the same referee, as the order of reference was not vacated, and no objection thereto was made at or before the trial.

I discover no error in the judgment, and am of the opinion that it should be affirmed, with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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ALEXANDER E. ORR v. THE CITY OF BROOKLYN.

New York, County of,—Boundary—Jurisdiction.

The waters of the Atlantic Basin, on the Brooklyn side of East River, are within the county of New York, and the city of Brooklyn is not liable for the destruction by a mob of a floating elevator within such basin.

THIS is an action founded on the statute of this State, passed April 13, 1855, by which compensation was given to parties whose property was destroyed by mobs or riots by an action against the city or county in which the property was situated. The action was against the city of Brooklyn, and the complaint alleged the destruction of the Plaintiff's floating elevator, with its machinery, on the night of July 15, 1863, and that the elevator, at the time of its destruction, was in the Atlantic basin, in the Twelfth Ward of the city of Brooklyn. The question presented is, whether the locus in quo of the elevator, at the time of its destruction, was within the boundaries of the county of Kings, of which county the city of Brooklyn was a portion. Under the charge of the Judge at the Circuit, the jury found a verdict for the Plaintiff for the value of the property destroyed, the Judge deciding the locality to be within the county of Kings.

The General Term of the Second District affirmed the judgment upon this verdict, and the Defendant now appeals to this Court. The facts are fully stated in the opinion of the Court.

Alexander McCue for the Appellants.

C. Van Sanfoord for the Respondent.

HUNT, J.—At the time of its destruction the elevator was lying in the Atlantic basin. This basin is on the Brooklyn side of the East River, which separates the city and county of New York from the county of Kings and from the city of Brooklyn, which forms a portion of the latter county.

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The East River is an arm of the sea, forming the westerly end of Long Island Sound, and connecting with New York bay and the Atlantic Ocean.

This basin is bounded on three sides by land, and on the fourth side is separated from the East River by piers, except for a space of about two hundred feet, which may be called the outlet or inlet of the basin.

The exterior lines of these piers extend along the bulkhead line, or permanent water line, as fixed by the act of May 26th, 1841, hereafter referred to.

The elevator laid inside of this bulkhead line, and inside of the line of Ferris street, in the said act also referred to. There are warehouses on these piers around the basin, on which the city of Brooklyn collects taxes. The evidence showed that the place where the elevator lay was below the original low-water mark on the shore of the East River, having an original depth of two or three feet, and was in water then of the depth of eighteen feet, the additional depth being caused by dredging. It also appeared that it was upon the tide-waters of the East River.

By the 3d Rev. Stat., p. 2 (1st edition), the county of Kings is bounded "northerly by the county of New York." By the same statute the county of New York, after giving previous courses, is bounded as follows: "then to cross over to Nassau, or Long Island, to low-water mark there; . . . then along Nassau, or Long Island shore, at low-water mark, to the south side of the Red Hook." The county of New York was described in the statute of 1788 as commencing "at Spuyten Duyvel Creek, where the same empties itself into the Hudson River, on the Westchester side thereof, at low-water mark, wherever the same now is, or hereafter may be, and so running along said creek at low-water mark, as aforesaid; . . . thence to cross to Nassau Island to low-water mark there, as aforesaid; . . . thence along Nassau Island shore at low-water mark, as aforesaid, unto the south side of the Red Hook."

The Red Hook is westerly of the Atlantic basin and docks.

The elevator, when destroyed, was lying inside of the piers

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erected by the owners of adjacent water lands, under the acts of May 25, 1836 (ch. 484), and of May 26, 1841 (ch. 268).

These acts authorized the then owners of land under water to erect and maintain wharves, warehouses, and piers on the land under water, in front of their lands, within certain limits mentioned, and of which Partition and Ferris streets formed the western and northern boundary, and certain streets named the other boundaries.

By the first of said acts three commissioners were designated, whose duty it was made to determine a permanent line of bulkhead in the East River, which might be erected without injuring the navigation of the river, and that no bulkhead should be extended into the river beyond said point. The effect of these acts is merely this: certain privileges are gratuitously allowed to the owners of adjacent water lands, and means are adopted to establish a permanent line, beyond or outside of which it shall not be permitted to erect any structures. These acts are designed to regulate that subject simply, and do not profess to affect the question of boundary or jurisdiction. In my judgment they do not affect it.

Nor in my view of the case is the difference in the language of the statutes giving the boundaries of the county of New York important in the present case. The Revised Statutes (sup.) speak of low-water mark on Long Island as the boundary of the county, while the statute of 1788 (sup.) gives the starting-point at low-water mark on Spuyten Duyvel Creek, wherever the same now is, or hereafter may be, and speaks of the low-water mark "as aforesaid," on the Long Island shore. This case is not affected by this difference, as will be seen.

It is conceded that the place where this elevator laid when she was destroyed was below the original low-water mark, and was then upon the tide waters of the East River, at the depth of eighteen feet. The county of Kings extended, by statute, only to the low-water mark of this river. What, then, are the facts or the principles upon or by virtue of which it is claimed that the elevator was nevertheless within the county of Kings?

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It is said that the descriptive words, "Along the Long Island shore at low-water mark" to Red Hook, excludes from New York, and includes in Kings, all creeks, or tidal basins, or whatever else is on the Long Island side of the shore line. Assuming this to be true, how does it affect a case like the present, where the locus is conceded to be below or outside of the shore line, and where there is no creek or natural basin?

At this time, and always, so far as the proof indicates, the spot where the elevator laid was under water.

It was naturally three feet below water mark, and is now, by dredging, eighteen feet below water mark, and is a part of the original open river, as distinguished from a creek or estuary.

If the evidence had sustained the idea that this spot was originally above low-water mark, and had now become below it, either by natural or artificial means, or that it was a portion of a creek or estuary, the argument would have been a strong one. The facts do not warrant such a claim.

The case of Luke v. The City of Brooklyn (43 Barb. 54), and affirmed in this Court in 1865, is cited by the Respondent. Like the present, that was an action to recover damages for the destruction of an elevator by a mob or riot. The elevator stood upon a pier built into the Atlantic basin, which was connected with a pier outside of it, and connected also with the wharf on the shore. The point at which it stood was originally some feet below water mark, and was made still deeper in the water by dredging.

The Court held the Defendant liable, and upon the question of location say: "Low-water mark is claimed by the Defendant to be the dividing-line between the cities of New York and Brooklyn. But we think it is low-water mark, for all the purposes of this action, as the water flows after the land is reclaimed from the river or bay by the erection of wharves and piers, and the filling in from the shore for that purpose. The jurisdiction of the city of Brooklyn must, from necessity, follow the shore as it advances into the river or bay, whether the accretion proceeds from alluvion or artificial deposits and erections. This is asserted in

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Udall v. Trustees of Brooklyn (19 John. R. 175)." I concur in this decision.

The wharves or piers are a part of the shore, and, as they were necessarily above the surface of the water, they were above the low-water mark, which gave jurisdiction. This does not affect the case now before us; and the difference between a case of a permanent erection above the water, like a dock or pier, and a vessel floating upon the water, is well illustrated by the cases of Udall v. Trustees of Brooklyn (supra), and the case of Stryker v. The Mayor, next reported in the same volume (19 John R. 179).

The former was a successful attempt to recover a penalty for measuring grain without a license on a dock in the city of Brooklyn, although the dock was beyond the natural low-water mark on the Long Island shore. The Court maintained the action, on the ground already stated.

The latter case was an attempt to recover a penalty for measuring grain on board of a vessel, made fast to the end of a dock on the Brooklyn shore of the East River, where the vessel was beyond the natural low-water mark, and the attempt failed.

The Court held that although the shore line could be extended by means of docks or wharves, it could not be extended by means of a vessel floating in the river, although she was fastened to the dock. The case of Luke v. The City of Brooklyn is therefore by no means decisive of the present case.

The piers and wharves may be parts of the shore, and within the county of Kings, and the space enclosed within them may yet be within the county of New York.

Indeed, I do not understand how a boundary line can be carried out, except upon this theory. Here is an open space, from the points of the piers, as they front upon the East River, of two hundred feet in width, of the depth of thirty feet, and below the natural low-water mark. Now, where is the shore at this point? The cut is entirely open to the river on the one side, and free from any erection or structure till it reaches Commercial street on the mainland on the other side. I think no one can say that this two hundred feet of open space is the shore or low-water mark.

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If not, the shore must be found on Commercial street, directly opposite to it. It results from this that the line of Kings county may follow the low-water mark as the Long Island shore, till it reaches the piers established by authority of the acts of 1836 and 1841, already cited, at Hamilton avenue. It may then follow the outer line of the pier till it reaches the cut or opening of the Atlantic basin, then follow the inner line of the pier, around the four sides of the piers, and around the lines of the inner piers or wharves, till it reaches the westerly side of the cut or opening, then resuming the low-water mark westerly along the shore of Long Island.

This, I think, is the true statement of the case, and it results in leaving the waters of the Atlantic basin within the territorial limits of the county of New York (see Mahler *v.* Transportation Co., 35 N. Y. 352).

Some stress is laid upon the effect of the act of April 17, 1854 (p. 829, §§ 1, 13) where the Twelfth Ward of the city of Brooklyn is described as beginning on the East River, at the centre line of Hamilton avenue, thence southerly along Hamilton avenue, &c., returning along Gowanus bay and East River to the place of beginning.

It is claimed that these outer lines include the premises in question. Without examining whether such would be the necessary effect of the description, it is a sufficient answer to say that this act was not intended to alter or determine the boundaries of the county. Assuming the boundaries to be fixed by law, a division was made of the territory as it existed into different wards, and that portion of it within the outer lines described, it was enacted, should constitute the Twelfth Ward. This was the extent of its effect.

Neither is it a circumstance of importance that the warehouses and erections upon the piers are subject to taxation by the city of Brooklyn, and that the taxes are annually collected upon them by that authority. I have shown the difference between the piers themselves and the waters enclosed by them.

The former are, by the decision of the Courts and the necessi-

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ties of the case, extensions of the shore, form a part of the dry land, and are therefore properly subject to taxation.

The waters below low-water mark, and the lands under them, are, on the other hand, expressly declared to be within the limits of the county of New York.

The constitutionality of the act of 1855 has been sustained in this Court in Darlington *v.* The Mayor (31 N. Y. R. 164), and in Luke *v.* Brooklyn (sup.).

I see no error in the statement of the Plaintiff's title to the property, or in the amount of his damages.

The point of the locality of the vessel at the time of her destruction is, however, fatal to the Plaintiff's right of recovery.

Judgment must be reversed, and a new trial ordered. All reverse.

JOEL TIFFANY,
State Reporter.

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ROWLEY, RESPONDENT, v. THE EMPIRE INSURANCE COMPANY, APPELLANT.

Insurance—Agency—Estoppel.

Where an insurance company employs an agent to solicit the insurance of property in their company, and furnishes blanks to be filled by the statement of the insured, and the agent of the company takes the responsibility of filling up these blanks, and assures the applicant that all is right, the company will not be permitted to prove the facts to be different from those stated by the agent in the application.

FULLERTON, J.—If this Court follows the decision in the case of Plumb v. The Cattaraugus County Mutual Insurance Company (18 N. Y. 392), this judgment must be affirmed.

That this case has changed the rule which has hitherto prevailed in this State relating to warranties in policies of insurance will be made apparent by a brief reference to it. In that case one Ide, in making out the application for insurance, acted as the agent and surveyor of the company. It was proved that he called upon Henry, the assured, with a printed blank application, and solicited him to effect an insurance with the Defendants' company. Henry expressed a desire to postpone making the application, but told the agent Ide that, if he insisted upon taking the application that day, he must get along alone, and act on his own responsibility.

Ide then proceeded to make the survey alone; after which he filled up the application, and stated to Henry that it was all right, and just as it should be. Henry, without any particular examination as to the statement of the distances between and relative situation of the buildings, told Ide that upon his representations and statements he would sign, and thereupon did sign the application, and paid the premium.

This testimony was objected to, and taken under exception.

On the trial of the action brought upon the policy, the insurance company, under objection, proved that there were material errors in the survey, as to the relative positions and distances of

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surrounding buildings, and gave testimony tending to show that the risk was increased thereby.

The Judge at the Circuit directed a verdict for the Plaintiff, and after affirmance by the General Term, the judgment was appealed to this Court, where it was held that the company was estopped from showing a breach of the warranty as to the relative situation of the buildings.

This decision was put on the ground that the insurance agent, acting within the scope of his authority, bound the principal in making the survey and filling up the application; and consequently the company could not be permitted to show that the contract was other than the writing expressed.

Mr. Justice Pratt, in delivering the opinion of the Court, says:

"But when the party through whose acts and representations the other party was induced to enter into the contract, claims the right to show that the facts were different from what he had represented them to be, for the purpose of showing a breach of the warranty, and thus avoiding what would otherwise be a binding contract, and escaping its obligations, I cannot discover why the doctrine of estoppel may not justly be applied to him, and he be precluded from denying what he once asserted. It presents, I think, the precise case for the application of the doctrine of estoppel in pais as defined in the cases."

It must be conceded that this case goes the whole length of establishing the doctrine that, although an application for an insurance contains a false statement as to a material matter, the writing must still be held to express the contract between the parties, and that neither party can insist that the contract is other than what the writing expressed, provided such false statement is chargeable to the agent of the company in making the survey and filling up the application, while acting within the line of his duty.

That this is in conflict with the rule as it has heretofore existed is apparent (Brown v. The Cattaraugus Co. Mu. Ins. Co., 18 N. Y. 385; Jennings v. The Chenango Co. Mu. Ins. Co., 2 Denio, 75; Vandervoort v. The Columbian Ins. Co., 2 Caines, 155;

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Cheriot *v.* Barker, 2 Johns. 346; Higginson *v.* Dall, 13 Mass. 96, 172; Weston *v.* Emes, 1 Taunt. 115; Atherton *v.* Brown, 14 Mass. 152; Parks *v.* General Ins. Co., 5 Pick. 34; Flinn *v.* Tobin, 1 Moody & Malk. 367).

This brings us to the examination of the facts in the present case.

The written appointment of the agent, Dean, shows that he was the agent of the Defendant "*to take applications* for insurance in the company, and receive the cash percentage to be paid thereon."

Acting under this authority, the agent received the application for insurance. The manner of doing it was as follows: Rowley stated verbally to the agent the facts necessary to meet the requirements of the rules of the company, and, among other things, informed him that the premises *were* encumbered by a mortgage.

An application was then signed in blank by the Plaintiff, and given to the agent—he promising to insert, over the signature thus obtained, the particulars thus furnished him, as a basis of the insurance, on his return to his residence.

The agent Dean was a witness on the trial of the case, and in giving the interview between himself and Rowley, at the time, says: "He" (Rowley) "made no objections to my taking it" (the application) "and filling it up at Horseheads, *if it would be all right.*"

The just and natural inference from this language is, that this unusual mode of doing the business was at the suggestion or request of the agent. But, be that as it may, for some reason unexplained, the agent, on his return, in filling up the application, inserted what was *not* the fact, and in violation of his instructions —that there was *no* encumbrance on the premises. The Defendant now seeks to avoid its liability on the policy, alleging that this statement was a warranty on the part of the assured, and that it was false.

The Appellant's counsel contends that Dean, in filling up this application, was the agent of the Plaintiff, and that the company is in nowise responsible for the mistake. I am aware that he is sustained in this position by the opinion of Mr. Justice Balcom,

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in Smith v. The Empire Ins. Co. (25 Barb. 497), but I do not think this Court should adopt that rule in this case.

Considering the authority of Dean in its most limited sense, "to *take* applications for insurance," I think he must be considered the agent of the insurer, rather than of the assured, in filling up the application.

His duty to his principal was to *take the application* for insurance. It cannot be said that that duty was performed when he received the blank paper signed by Rowley, because the application was then in an inchoate state.

The conditions of insurance plainly contemplate that it should be in writing, and such was the intention of the parties. When, therefore, was the duty which the agent owed to the company at an end, so that he ceased to bind his principal? It is not establishing a harsh or unreasonable rule in reference to insurance companies to hold that their agents, authorized "to take applications for insurance," are acting within the scope of their authority in everything which they do which may be necessary to complete such applications.

I must, therefore, regard Dean as in the act of *taking* the application when he was filling up the blank signed by the Plaintiff, and therefore acting on behalf of the Defendant. Any other rule would be fraught with mischief. Insurance companies send out an army of agents to solicit business. Property-holders are waited upon by them at their residences; and it is not going too far to say that many of the applicants would be unable to make a proper application and survey, to meet the rigid and elaborate requirements of these corporations, while experience shows that they are not expected to do so.

Hence these agents render such services as are necessary to enable the contracting parties to attain their respective objects—the one to insure, and the other to be insured, against fire. To hold that in performing these preliminary labors touching the very business which must necessarily be transacted before a policy can be effected, the insurance broker becomes the agent of the applicant for insurance, would seem to be an unnecessary and un-

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desirable refinement. I repeat, that in performing these preliminary labors, the agent is engaged in *taking the application*, which is strictly within his duty, and the principal should be held responsible for any error he may commit, especially when the error consists in recording a false statement over the signature of a confiding applicant, which, it is claimed, vitiates the whole contract.

Rowley, in this case, told the truth in regard to the encumbrance on the property, and in that respect discharged his duty.

That satisfied the claims of morality and fair dealing, and ought to meet the requirements of the law (vide Masters *v.* Madison Co. Ins. Co., 11 Barb. 624). If these views are concurred in, then the Defendant, on the principle of Plumb *v.* The Cattaraugus Ins. Co. (supra), is estopped from showing its own error to defeat its own contract.

This disposes of the only question raised by the Appellant's brief.

Another point is made, however, in the bill of exceptions, which will be briefly considered.

It was alleged in the answer, and proved on the trial, that Goff, the former owner of the premises, had insured his interest as mortgagee in this same property, and that the Plaintiff had failed to make known that fact, when he effected his policy, as he was required to do by the conditions of insurance.

This raises a mere question of notice; and the point is met by the proof that Goff's policy was issued by the Defendant, and that the Plaintiff was ignorant of that fact (Ames *v.* N. Y. Union Ins. Co., 14 N. Y. 253).

The law is not so unreasonable as to declare void a contract of insurance on the ground that the assured did not make known the existence of a policy, of which he had never heard, to a company which had issued it, and necessarily knew of its existence.

The judgment should be affirmed, with costs.

Judgment affirmed.

All concur, except BOCKES, who does not vote; and GROVER dissents.

JOEL TIFFANY,
State Reporter.

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JACOB STOVER AND OTHERS, v. JACOB C. EYCLESHIMER, JOHN B. SHERMAN, AND OTHERS.

Partition—Heir-at-law—Expectancy—Transfer.

The expectancy of an heir is capable of being transferred as security for the payment of a just debt, and when the same is done during the lifetime of the ancestor, it will be deemed to be a transfer of all legal and equitable right of such heir's expectancy in the estate of such ancestor; and although there can be no vested estate in the property during the life of the ancestor, a Court of Equity will recognize and protect the interest of the transferee after the death of the ancestor.

BOCKES, J.—This is an appeal from the judgment of the General Term of the Supreme Court, affirming the judgment entered at Special Term, on the report of a referee.

The action was in partition. The decree declared the rights of the parties, directed a sale of the premises, and also distribution of the avails.

The decree was satisfactory in all respects, except as to the share of John L. D. Eycleshimer, which share was a subject of controversy between the Defendants, Jacob C. Eycleshimer and John B. Sherman. The former claimed such share as a judgment creditor of J. L. D. E., under attachment proceedings; the latter claimed as purchaser. By the judgment of the Supreme Court it was awarded to Mr. Sherman, the purchaser.

The facts on which these parties rested their claims were as follows: John P. Eycleshimer died intestate, June 10th, 1861, seized of the premises described in the complaint, leaving J. L. D. E. entitled, as heir-at-law, to share in his estate. Prior thereto, and in September, 1858, J. L. D. E. executed and delivered to Caroline M. Sherman an irrevocable power of attorney, coupled with an interest, to ask, demand, sue for, recover, and receive all such interest, estate, property, and effects, real and personal, as he then had, or at any time thereafter should have, as heir-at-law, devisee, legatee, or next of kin of his father, J. P. E., with power to sell, dispose of, and convey the same, and apply the proceeds

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to the payment of a debt of $1,573 and interest, which said J. L. D. E. then owed to her. The instrument, under seal, was acknowledged March 2, 1859, and was recorded August 24th, 1861, in Rensselaer county, in which county the premises were situated. On the 12th day of September, 1861, Caroline M. Sherman executed and delivered to the Respondent, John B. Sherman, pursuant to said power of attorney, a conveyance of all the interest of said J. L. D. E. in his father's estate, and also all her interest, legal and equitable, therein. By virtue of these instruments, the Respondent Sherman claimed the share of J. L. D. E. in his father's estate, which interest was insufficient to satisfy the debt of $1,573 specified in the power of attorney.

The claim of the Appellant to the interest of J. L. D. E. arose as follows: On the 22d October, 1861, he recovered a judgment in the Supreme Court against J. L. D. E. for $1,021.61, in an action commenced August 6th, 1861, in which action, and on which day, a warrant of attachment was issued to the sheriff of Rensselaer county, who, on the same day, attached the interest of J. L. D. E. in his father's estate. Notice of pendency of the action was filed August 14, 1861.

The question then is, who had the better right—the Appellant, who claimed as an attaching and judgment creditor; or the Respondent, who claimed as an equitable purchaser or assignee, holding the position of Caroline M. Sherman, whose rights he had acquired?

In point of time the latter had the priority; for at the decease of the intestate, June 10, 1861, Caroline M. Sherman held the instrument which was the basis of the Respondent's right. The warrant of attachment was not levied until August 6th thereafter. The question is, therefore, whether the instrument executed to Caroline M. Sherman took effect on the decease of the intestate, either as a legal or equitable transfer of the estate which descended to the heir-at-law.

It is undoubtedly true that J. L. D. Eycleshimer had no vested interest in his father's estate at the time he executed the instrument—only a bare possibility, which, of course, was not the subject

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of a grant, nor did the instrument contain a covenant which could be made to operate as an estoppel. And it may, I think, be assumed in this case, that the instrument did not effect an absolute transfer of the legal title, and yet uphold the Respondent's claim. If it was such an instrument as a Court of Equity would enforce on the decease of the ancestor, it was effectual for the Respondent's purpose. That it was such seems to me to be undeniable. The plain object which the parties had in view was to transfer the expectancy of an heir as a security for the payment of a just debt. In Fonblanque's Equity (218) it is said that although a grant of a possibility is not good in law, yet it may be assigned; and Judge Story lays it down (§ 1040) that even the naked possibility or expectancy of an heir to his ancestor's estate may become the subject of a contract of sale or settlement; and in such case, if made bonâ fide, for valuable consideration, it will be enforced in equity after the death of the ancestor—not, indeed, as a trust attaching to the estate, but as a right of contract. So, too, it is laid down, in Spence's Equitable Jurisdiction, that an expectancy or contingent interest may be sold, and the Court of Chancery, after the event has happened, will enforce the sale (2 vol. 865). It is true that Judge Cowen remarks, in Munsell v. Lewis (4 Hill, 642), that he was of the "opinion that a simple expectancy, in which the assignor had no interest, and which is unpurchasable, can neither be assigned, nor would a contract for future assignment be valid." And so Judge Willard has said in general terms that "a bare possibility of an uncertain interest is not assignable" (Will. Eq. Jur. 461). These remarks, however, without qualification, can hardly be deemed sound law at the present day; for in Field v. The Mayor (6 N. Y. 179), it was held that "an assignment for a valuable consideration of demands, having at the time no actual existence, but which rest in expectancy merely, is valid in equity as an agreement, and takes effect as an assignment when the demands intended to be assigned are subsequently brought into existence." The learned Judge who gave expression to the views of this Court in that case says: "There was indeed no present, actual, potential existence of the thing to which the assignment

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or grant related, and therefore it could not, and did not, operate eo instanti to pass the claim which was expected thereafter to accrue to Bell against the Corporation; but it did, nevertheless, create an equity which would seize upon those claims as they should arise, and would continue so to operate until the object of the agreement was accomplished. On this principle an assignment of freight to be carried in future will be upheld and enforced against the party from whom it becomes due." And he adds: "Whatever doubts may have existed heretofore on this subject, the better opinion, I think, now is, that Courts of Equity will support assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no present actual existence, but rest in possibility only, provided the agreements are fairly entered into, and it would not be against public policy to uphold them. Authorities may be found which seem to incline the other way, but which, upon examination, will be found to have been overruled, or to have turned upon the question of public policy." This decision by this Court seems directly in point, and is conclusive of the case before us on this appeal. It may be well, perhaps, here to refer to the decision in Milliman v. Neher (20 Barb. 37), and the cases there cited. It was there held that a chattel mortgage could only operate upon property in actual existence at the time of its execution. In that case the question arose in regard to the *legal title* to the property, and the decision should be construed with reference to that fact; otherwise the case is in conflict with numerous later decisions, where it has been held that such mortgage would be enforced in equity whenever the property should be obtained, or should be brought into existence.

The instrument under which the Respondent claims was evidently intended to be, and by its tenor was, more than a mere power of attorney. It was intended to vest in Miss Sherman an interest in the property as a security for the payment of J. L. D. Eycleshimer's debt to her. With other rights conferred on her thereby, she was to receive the proceeds and avails of the property, "and of all my interest and estate therein, *and all my estate, property, and effects aforesaid*, and apply the same respectively

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to the payment and discharge of the" debt which, he therein declared, he justly owed her. Now, here was a clear appropriation by J. L. D. E. of his expectations as heir-at-law in his father's estate—in effect a transfer thereof as security—equivalent, in all essentials, to a mortgage, in exact and legal phrase.

The instrument could undoubtedly have been enforced against J. L. D. E., on his father's decease, according to its plain import and purpose. He could not have resisted its just effect as a claim or lien on the property. If not, it follows, of course, that his creditor could not acquire a superior right, either by attachment or other proceeding. A creditor could only obtain his position and rights.

It is objected that the consideration of the instrument was a pendent debt, and, consequently, that Miss Sherman could not have insisted on her equity against the claims of an attaching and judgment creditor.

It is not suggested that the debt was not a just one, nor is it intimated that the instrument was not given in entire good faith. Regarding the instrument as an equitable security for the satisfaction of a just debt, the consideration was abundant and bonâ fide. This precise point was considered by Judge Selden in Seymour *v.* Wilson (19 N. Y. 417, 421). The learned Judge there shows that a transfer directly to a creditor, in payment of, or as security for, an honest debt, in the absence of meditated fraud, is good against the claims of both existing and future creditors of the vendor. He says: "It is not necessary in such a case that the vendee, in order to protect himself from a claim by the other creditors, should show any new consideration paid." He adds: "There is no doubt that the debt paid *or secured* by the transfer must, in such case, be regarded as a valuable consideration within the section which saves the rights of bonâ fide purchasers; so that if the creditor acts in good faith, and for the mere purpose of obtaining satisfaction of his own debt, in accepting the transfer, he will acquire a valid title. There being no equity prior to his own to be overcome, the necessity which calls for proof of a new consideration in other cases does not exist." The objection, that the

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instrument is not supported by a valid consideration, is not well taken.

The case then comes to this, that Miss Sherman held, as security for the payment and satisfaction of a debt due her, a valid, equitable claim on the estate of J. L. D. Eycleshimer, which came to him by descent, on the decease of his father, intestate, June 10, 1861, which claim then became a vested right in her, capable of equitable enforcement; and that the Respondent in this appeal acquired her position and succeeded to her rights. The Appellant's proceedings and judgment were subsequent thereto, the warrant of attachment having been levied on the 6th August, 1861, and the judgment entered in October following. The claim of the Respondent to the fund in controversy was, therefore, paramount to that of the Appellant; and the judgment of the Supreme Court to that effect should be affirmed.

Affirmed, with costs.

JOEL TIFFANY,
State Reporter.

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THOMAS RIGNEY ET AL., RESPONDENTS, v. GEORGE SAVORY ET AL., APPELLANTS.

Practice—Case.

PARKER, J.—The Respondents submit this case, with an affidavit showing that no copy of any printed case, on the appeal to this Court, has been served on the Respondents' attorney, and no such case is handed up to the Court. The Appellants do not appear upon the argument, nor submit upon their side. We have nothing before us showing any judgment of the General Term of the Superior Court of the City of New York, in which Court the action was brought; the only papers upon which we are asked to proceed being the said affidavit, and the case and exceptions in the Court below. These, of course, show neither the judgment given by the General Term, nor the notice of the appeal therefrom to this Court. For aught that appears, no judgment has been given by the General Term. There is nothing, therefore, upon which this Court can proceed to judgment.

The appeal must therefore be dismissed, with costs.

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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AUSTIN MELVIN AND OTHERS, RESPONDENTS, v. JAMES WOOD, APPELLANT.

Practice—Bill of Particulars—Amendment—Discretion.

A bill of particulars attached to a complaint forms a part of the pleadings in the case; and under the provisions of law authorizing a referee to allow amendments of the pleadings, he may allow such bill of particulars to be amended by the substitution of a new one in its stead. Such permission to amend is in the discretion of the referee, and not reversible.

A. J. Parker for Appellant.
J. H. Reynolds for Respondents.

DAVIES, CH.J.—The Plaintiffs claim to recover in this action a balance of account due them from the Defendants, copartners, transacting business under the name of Samuel Barker. The referee before whom the action was tried found the following facts:

1. At the times in said report mentioned, the Plaintiffs were, and still are, copartners in business in the city of New York, under the firm-name of Melvin & Danforth.

2. On the 1st day of April, 1859, the Defendants became copartners in the business of tanning hides and skins in the Highland Tannery, Newburgh, Orange county, under the firm-name of Samuel Barker; and such copartnership continued from said 1st day of April, 1859, until after the 5th day of November in the same year.

3. That between the 9th day of April and the 5th day of November, 1859, both inclusive, the Plaintiffs, at the request of the Defendant, sold and delivered to them, on divers days, hides and leather, and lent and advanced to them cash, amounting, a together, to the sum of $9,134.80, as now particularly appeared in a schedule annexed to his report, marked A.

4. That during the times aforesaid, and on divers days after the dissolution of Defendants' said firm, prior to July 10, 1860, the Plaintiffs received from Defendants, for sale on commission, for

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account of said Defendants, divers quantities of leather, and sold the same for Defendants' account, and credited the Defendants with the net proceeds thereof; and that during the same period they made certain allowances as credit to said Defendants, on account of damage on hides sold them, and of a small balance due from the said Plaintiffs to Defendant Barker, at the date of the formation of said firm of Samuel Barker.

5. That the net proceeds of such sales, including said allowance, after deducting all commissions, charges, disbursements, and allowances, amounted to the sum of $7,521.99, and the items of said credit were stated in detail in said Schedule A.

6. That by agreement between Plaintiffs and Defendants, the Defendants were to be charged with interest on sales from the time when the same became due, and on all moneys advanced, from the date of such advance, and were to be credited with interest on all proceeds of sales for their account from date of realizing said proceeds; and on the 10th of July, 1860, the balance of interest on said accounts of debits and credits was in favor of Plaintiffs, and amounted to $184.32, and there was then due from Defendants to Plaintiffs, on said account, a balance of principal and interest amounting to the sum of $1,797.13.

7. That on said 10th of July, 1860, payment of said balance was demanded of said Defendant Wood.

8. That no part of said balance had been paid by said Defendants to said Plaintiffs; but that the whole amount thereof was due from said Defendants to said Plaintiffs, with interest thereon from said 10th day of July, 1860.

The said referee accordingly reported, as a conclusion of law, that the said Plaintiffs were entitled to recover that sum, and judgment was thereupon entered in favor of the Plaintiffs therefor, and on appeal the same was affirmed.

The Defendant Wood now appeals to this Court.

Upon the facts found by the learned referee, the judgment in favor of the Plaintiffs for the amount thereof was clearly correct, and must stand, if no errors were committed upon the trial. This I understand to be conceded by the learned counsel for the Ap-

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pellant, and he therefore proceeds in his brief to point out the several erroneous rulings which, in his opinion, he thinks the referee made upon the trial.

1. It is urged that the referee erred in excluding this question, put to the Defendant Wood, on his examination as a witness: "Did you ever know that any goods bought by Raybold & Barker, previous to April 1, 1859, were carried into the account of your firm?" It had appeared from the previous testimony of the Defendant Barker, taken without objection, that, previous to the formation of the copartnership between the Defendants, the Defendant Barker had been in partnership with a man named Raybold; that the goods of Barker & Raybold went with the stock of Wood & Barker; that they had been partly tanned at Harlem, were finished at Newburgh, sent to Plaintiffs for sale, the proceeds passed into the new books, and the note given by Barker & Raybold was paid by the new firm.

It is not perceived how the Plaintiffs were affected by the fact whether Wood knew or did not know whether any goods bought by Barker & Raybold, previous to the formation of the Defendants' partnership, were carried into the accounts of the firm of the latter. Such knowledge on the part of Wood was wholly irrelevant and immaterial to these Plaintiffs. But the exception to the exclusion of the question is of no moment, as the Defendant Wood immediately thereafter testified that he never knew or sanctioned any transfer to his firm of any of the transactions of the Plaintiffs with Raybold & Barker. This covered the fact of Wood's knowledge that any goods bought by Raybold & Barker were carried into the accounts of the new firm.

There was no error in the exclusion of the question; but if there was any, it worked no injury to the Defendant Wood, as he subsequently testified that he never knew of any such tranfer.

2. It is objected that the referee erred in allowing the Plaintiffs to amend their bill of particulars. To the complaint was annexed, and served therewith, an account of the Defendants with the Plaintiffs, appropriately designated as a bill of particulars. It formed a part of the pleadings in the action. Upon the trial,

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the counsel for the Defendant Wood moved for leave to amend his answer, so as to conform to the second and third heads of the defence, and particularly the counter-claims, to the testimony already given, and particularly to the testimony of Samuel Barker. The referee decided to allow the amendments to the answer of the Defendant Wood, as proposed by his counsel, and thereupon the same was amended accordingly. The Plaintiffs' counsel then moved for leave to amend the complaint by substituting, in the place of the original bill of particulars, a new bill of items filed with the referee, to which the counsel for the Defendant Wood objected; and the referee overruled the objection, and allowed the amendment to the complaint; and to this decision the counsel for the Defendant Wood then and there excepted.

Sections 169 and 173 of the Code fully authorized the referee to amend the pleadings of the respective parties in this action, and we do not regard his rulings in this respect open to review in this Court. It was a matter resting in the discretion of the referee, and we think it was properly exercised in the present instance. We think it hardly lies with the Defendant to object that the same favor was allowed to the Plaintiff which he asked for and was accorded to himself, particularly as the very amendments to his pleadings, which he made by leave of the referee, probably necessitated and called for amendments on the part of Plaintiffs. The privilege which was conceded to one party was properly granted to the other, and we see no error in the referee's rulings on this branch of the case.

It is urged that the referee improperly excluded evidence of the contents of the books of the Defendants. We are not favored with an authority or a principle whereby it is established or shown that the books of a party can be adduced as evidence on his own behalf, and made testimony against his adversary. Such books are but the acts and declarations of the party making them, and upon no rule of evidence can they be competent testimony on behalf of the party keeping and making them. The referee properly excluded them.

The Plaintiff Melvin, in his cross-examination as a witness by

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the counsel of the Defendant Wood, was asked if he did not remember that Mr. Wood, in the early part of April, 1860, obtained from him a statement of the account of his firm, to use, as he (Wood) told him, on a church trial, with Mr. Raybold. He answered: "I can fix no date; I have no recollection of giving him an account at that time for any purpose; I have no recollection of giving him, at any time, an account to be used at such a trial."

Wood, on his examination as a witness in his own behalf, testified that he called on Melvin for an account. He told him he was going to have a church trial, and wanted a correct account. He (Melvin) went to his books, and took that off, and said it was a correct account. The witness Wood then produced the account bearing date April 3, 1860, showing a balance due by Defendants of $1,633.88.

The Plaintiff Melvin, after the Defendant Wood had rested, was recalled for the Plaintiffs, and asked, "From what book did you make exhibit 1, May 13—that is, the account of April 3, 1860?"

Answer: "Partly from the ledger; the $1,148.34, as it then stood, as far as posted; and then there were two notes, one for $1,190.32, and one for $1,423.22, which had fallen due a few days before, but were not posted; I took them from the bill-book; the estimated value of the stock I took from the commercial sales book; the quantity of goods appeared on the books; the value, as estimated, was not taken from the books at all, but was a mere estimate."

All this evidence, given under this question, and the question itself, was objected to, in due time, by the counsel of the Defendant Wood, and the objection overruled, and the counsel for the Defendant Wood duly excepted. The witness was then asked: "Was any computation of interest made?" Like objection, decision, and exception. He answered, "No." He was then asked: "Was there any computation of commissions of guarantee?" Like objection, decision, and exception. He then answered, "No." He was then asked: "Was any more leather received by your

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firm from Barker & Wood after November 16, 1859, than you have stated in your former evidence and statement of account?" Like objection, decision, and exception. He then answered, "No."

It is difficult to perceive any sound reasons for the objections to this testimony on the part of the witness Melvin. The Defendant Wood had introduced as evidence the account of April 3, 1860, as coming from the witness Melvin. It was certainly competent, after his memory had been refreshed by the production of the original account, as made out by him, and by him delivered to the Defendant Wood, also to testify in regard to it, and make such explanations as he could in reference to it. It certainly is no good reason why the witness Melvin should not be permitted to testify in regard to this paper, after its production, and had been made evidence by the Defendant Wood, that he (Melvin) had previously testified, on his cross-examination by the Defendant Wood, that he had no recollection of ever having given to him (Wood) any such account. Such testimony, at most, could only be used to discredit what Melvin might say in reference to the account, or tend to weaken or counteract the force of the explanation he might make in regard to it. It in no just sense furnished any objection whatever why he should not be permitted to testify in regard to said account, the circumstances under which it was made up and rendered, and make such explanations as he deemed needful in reference to it. It was for the referee to determine how much weight or credibility he would attach to his statements in these particulars.

We have examined carefully all the exceptions taken to the rulings of the referee, and we are of the opinion that they are untenable, and that the decision of the referee must be sustained.

It follows that the judgment must be affirmed, with costs.

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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MERCY RANGER, APPELLANT, v. CHARLES B. GOODRICH, RESPONDENT.

Mortgage—Satisfaction.

Where a note is given as a part payment of mortgage, the mortgagees cannot be compelled to cancel the mortgage until the note is paid.

PARKER, J.—This is an action to compel the satisfaction of a mortgage.

The Defendant had an assignment of a mortgage given to secure $1,300, but held it as trustee for the mortgagor to the extent of $400. The mortgagor being unable to pay the money secured, after such assignment to the Defendant, conveyed the mortgaged premises to the mortgagee.

The Plaintiff, owning a farm in Wisconsin, arranged with the Defendant to exchange it for his interest in the mortgage, that being $900, and one year's interest thereon.

After the conveyance to the mortgagees, the arrangement was changed, and Defendant procured from the mortgagor a warranty deed of the premises to the Plaintiff, who conveyed to Defendant her farm in Wisconsin, and gave him, for the mortgage, notes to the amount of $118, which amount they had consented to take for their interest in the mortgage. In reference to the interest of the mortgagees, Defendant acted as their agent, as Plaintiff knew.

The notes being unpaid, the question is whether the Plaintiff is entitled to have the mortgage wholly satisfied, or whether the mortgagees are entitled to its lien as security for the payment of the $118.

I think the referee was right in holding that the Defendant could not be compelled to satisfy the mortgage as to the interest held by the mortgagees, unless they were parties to the suit.

It is insisted that the referee has found as a fact, that the Plaintiff purchased the interest of the mortgagees for the $118, and hence that they have no further interest in it, and so are not

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necessary parties. Taking the whole of the referee's report together, the finding of fact does not warrant that assumption.

The most that can be said is, that the purchase was a conditional one; the security of the mortgage for the $118 to remain in the mortgagees until the money was paid, or otherwise secured.

In this view, even if the mortgagees were parties, the view of the Supreme Court at General Term is correct, that the Plaintiff would be entitled to satisfaction of the mortgage only upon payment of the $118.

The judgment is clearly right, and should be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THE ATLANTIC DOCK COMPANY, Respondent, v. THE CITY OF BROOKLYN, Appellant.

New York County, Boundary—Riot Act—Laws 1855.

The boundary of territorial jurisdiction between the counties of New York and Kings is the actual line of low water on the Brooklyn side of East River.

Appeal from the Supreme Court. The action was for the recovery, under the Riot Act of 1855, of the damages sustained by the Plaintiffs, through injuries to their property by a mob, on the 15th of July, 1863. The complaint alleged the facts on which the claim was based, and the answer consisted of a mere denial of the allegations.

The cause was tried at the Kings Circuit, on the 15th of June, 1864, before Mr. Justice Lott and a jury, and it resulted in a verdict in favor of the Plaintiffs for $17,450.66.

It appeared on the trial that the pier injured by the mob was erected on piles in the basin, below the original line of low-water mark, on the Brooklyn shore of the East River, and that its foundations were penetrated by the tides. The dredging-machine, which was destroyed by the rioters, was floating within the Atlantic basin, and below the original low-water line.

It also appeared that on the 25th of September, 1845, the Plaintiffs filed a map of this basin and the adjoining property, in the office of the Register of Kings county. It was entitled a map of property in the Sixth Ward of the city of Brooklyn, belonging to the Atlantic Dock Company. It exhibited only the side bulkheads, the pier not having yet been built.

The Defendants thereupon moved for a dismissal of the complaint, on the grounds:

1. That the property injured and destroyed was not within the bounds either of the city of Brooklyn or of the county of Kings.

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2. That the statute on which the action was based is unconstitutional; that the remedy it provides is uncertain; and that the action, if any, should have been against the county.

The motion was denied, and the Defendants excepted.

The Defendants then requested the Court to instruct the jury that the pier in question was within lands dedicated by the Plaintiffs to the use of the public, and that there could be no recovery in the action for damage thereto. The Judge refused, and the Defendants excepted.

These were the only exceptions taken on the trial. The judgment rendered on the verdict was affirmed on appeal at a General Term in the Second District, and the Defendants appealed to this Court.

Alexander McCue for Appellants.
Nathan Burchard for Respondents.

PORTER, J.—The statute under which the action was brought is free from constitutional objection (Darlington *v.* Mayor of New York, 31 New York, 164). The pier injured by the rioters was within the limits of the city of Brooklyn. It has been repeatedly adjudged that the boundary of territorial jurisdiction between the counties of New York and Kings is the actual line of low water on the Brooklyn side, whether corresponding with the original low-water line on the East River shore, or varied by the permanent encroachment of docks, piers, and wharves, or other artificial erections for the purposes of general commerce (Stryker *v.* Mayor of New York, 19 Johnson, 179; In the Matter of Furman Street, 17 Wendell, 649, 660; Luke *v.* City of Brooklyn, 43 Barbour, 54; S. C. affirmed in the Court of Appeals, June Term, 1865). The motion to dismiss the complaint was, therefore, properly denied; a cause of action was established by the proof, and a nonsuit would have been plainly erroneous.

It is suggested that damages should not have been included in the verdict for the destruction of the dredging-machine, on the ground that it was afloat on the waters of the Atlantic basin, and without the bounds of the city of Brooklyn. That question is not

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before us for consideration. Our province is simply to determine whether any erroneous ruling was made in the court below, and not to retry the original issue. The Defendants requested no instruction to the jury on this subject, and they cannot complain of the Judge for omitting to pass upon a question of the law which was not submitted to him for decision.

The Court properly refused to charge that the pier had been dedicated by the Plaintiffs to the use of the public. Such an instruction would have been wholly unwarranted by the evidence.

The judgment should be affirmed, with costs.

All the Judges concurring, judgment accordingly.

JOEL TIFFANY,
State Reporter.

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JAMES H. SEGUINE, APPELLANT, v. HENRY L. SEGUINE AND OTHERS, RESPONDENTS.

Will—Testator—Capacity—Undue Influence.

Under our law a testator, having testamentary capacity, and being free from improper influence, can make what disposition of his property he please. If capacity, formal execution, and volition concur, the will, however absurd or unjust, must stand.

Undue influence, in such a sense as to avoid a will, must be an influence exercised by coercion, imposition, or fraud, and not such as arises from the influence of gratitude, affection, or esteem. It must be the ascendency of another will over that of the will of the testator.

APPEAL from a judgment of the Supreme Court, affirming a decree of the Surrogate of the County of Richmond, admitting to probate the will of James S. Seguine, deceased.

The will in question was executed on the 22d May, 1859, at Rossville, in the county of Richmond, at the house of the testator's brother, Henry L. Seguine. The testator died at his residence at Deep Creek, in the State of Virginia, on the 11th of January, 1860, leaving an only son, James Henry Seguine.

The executors named in the will, on the 20th January, 1860, propounded the same for probate before the Surrogate of Richmond County; and it was opposed by the testator's son, on the ground of a want of testamentary capacity in the deceased, and further, that it was procured by undue influence. The question of capacity was principally litigated; the contestant claiming that, through intemperance and disease, the deceased was incompetent to make a will, or if not legally incompetent, was *imbecile*, and in that condition was unduly influenced. The testimony taken before the Surrogate fills a volume of 600 pages, most of it on the part of the contestant, relating to the condition and habits of the testator, and of matters transpiring in the summer and fall of 1859, at Rossville, after the making of the will. It is impracticable to give anything like a precise analysis of the voluminous

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testimony, nor is it important. The prominent and material facts are referred to in the opinion.

On the 15th October, 1864, the Surrogate made a decree admitting the will to probate. The contestant appealed to the Supreme Court, in the Second District, where the decree was affirmed, and he now brings an appeal to this Court.

A. W. Bradford for Appellant.

A. C. Bradley and *S. Hunt* for Respondents.

WRIGHT, J.—James S. Seguine, the validity of whose will is the subject of this appeal, died at his residence, at Deep Creek, in the State of Virginia, on the 11th of January, 1860, at the age of about fifty-five years. He was born in the county of Richmond (Staten Island), his family being an ancient one in the county, but from early life had resided and was engaged in business in Virginia. His business was mainly lumbering in the Dismal and other Southern swamps; but in connection therewith he built and owned shares in several vessels employed in the transportation of his lumber and other freight. This business was continued until his death.

He left an only son, the Appellant, who was a few months old at the death of his mother, in 1838. His other near relatives were a sister, the widow of a Mr. Guyon, and a brother, Henry L. Seguine.

The brother and sister always resided on Staten Island, as did the son, who was reared in the family of the sister—the deceased, after the death of his wife, never marrying again, or keeping a domestic establishment. He had lodgings in Virginia, where he spent most of his time, visiting the North in the summer season; and on such occasions, and when north on business, made his brother's house, on the island, his home.

The deceased had accumulated an estate, at his decease, of probably something over $100,000. With the exception of a farm on the island, formerly belonging to his father, purchased by him in 1858, and fitted up and improved at a cost of some $15,000, as a home for his son, his property was principally personal, con-

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sisting of money invested in Virginia, and at the North. By his will, executed in May, 1859, some seven months prior to his death, and on his last visit to the North, after giving specific legacies to the amount of $2,000, he gave to his sister, Mrs. Guyon, an annuity of $500; to his son, James Henry Seguine, an annuity of $700, and also an estate for life in the homestead farm purchased for him in 1858, remainder to his son's children—if no children, to his grandchildren, with a direction to the executors to expend the further sum of $4,000 in improving the farm for the son's use; and to the brother, Henry L. Seguine, the residue of the estate.

No point is made that the requisite statute formalities, to sustain the execution of the paper as the will of the deceased, were not duly observed; the objection being as to the testamentary capacity of the deceased, and whether the will was, or was not, procured by undue influence of the chief beneficiary. The bulk of the property, it is true, is given to the testator's brother; and it may be conceded that the will is a will inofficious, so far as regards his son. But if the son had been wholly disinherited (which he is not, but a moderate competency given to him), not in favor of the brother, but of parties strangers in blood to the deceased, it would be no ground, of itself, for avoiding the instrument.

The doctrine of inofficious testaments invoked from the books has no place in our law. A man has a right to make whatever disposition of his property he chooses. If capacity, formal execution, and volition appear, his will, however absurd or unjust, must stand. "A disposing mind," says Cresswell, J., in Earl of Sefton v. Hopwood (1 Fos. and Fin. 578) "does not mean that a man should make what other people may think a sensible will, or reasonable will, or a kind will, because, by the law of this country, a man has absolute dominion over his own property; and if he, being in possession of his faculties, thinks fit to make a capricious will, a harsh will, or cruel will, you have no right to interfere; that would be to make his will for him, and not to allow him to make it." "The right of a testator to dispose of his estate," said Porter, J., in delivering the opinion of this Court in Clapp

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v. Fullerton (34 N. Y. 197), "depends neither on the justness of his prejudices, nor the soundness of his reasoning. He may do what he will with his own; and if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though the provisions are unreasonable and unjust" (Grindall v. Grindall, 4 Hag. Ec. R. 1; Wrench v. Murray, 3 Curt. 623; Butlin v. Barry, 1 Curt. 614; Peck v. Cary, 27 N. Y. 18).

If the deceased, then, possessed the requisite testable capacity, and the instrument was the free emanation of his will, it is valid, and is entitled to probate; and it is incumbent upon us so to adjudge, much as, in another sense, we might be inclined to regard the narrow provision for the son, in view of the deceased's wealth, as unjust and undutiful.

There are, therefore, but the two questions—was there capacity, and freedom from restraint?

As to capacity. The evidence as to the general capacity of the deceased is but one way. The case is not a balanced one, but one where the evidence greatly preponderates on that subject. The deceased, as has been stated, had been actively engaged in lumbering in Virginia for over thirty years, and, according to all the testimony, was an unusually shrewd and energetic business man. His mind was clear, vigorous, and strong. He was also a firm man, decided, self-reliant. A witness characterizes him (and this was the tenor of all the proof) as a man of "great capacity for business, remarkable for his firmness, self-reliance, and tenacity of purpose." That clearness, solidity, and strength, were the general mental characteristics evinced by him throughout most of his life, is not questioned by the Appellant. But it is insisted that disease and intemperance, within the two years prior to his death, effected a change in his mental condition; and that when the will was made he was insane, or if not properly insane, was imbecile. The suggestion that insanity existed in any form, or that the testator's mental faculties were perceptibly impaired at the time of the factum, is wholly unsustained by the proof. On the contrary, the proofs establish the fact that, at that time, his mind was as vigorous and sound as it had ever been. The

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instrument was prepared by Lot C. Clark, Esq., for many years his legal adviser in relation to his affairs at the North. Mr. Clark was alone with him in his room, at his brother's house, some two or three hours, conversing in respect to his property, receiving his instructions, getting his exact views in regard to the provisions of the will, his slaves, and the laws of Virginia and North Carolina as to them, and in drawing the instrument as it was finally executed.

All the directions for drawing it were given by the deceased, without a suggestion from any other person. He exhibited a will which had been made by him the year before, and which had been drawn by Judge Metcalf, the Surrogate of the county, and suggested the alterations he desired to make, assigning his reasons therefor. He named as witnesses Dr. Edgar, for many years his attending physician when visiting at the North, and Judge Winant, a friend from boyhood, and requested Mr. Clark himself to sign as a witness.

According to the testimony of Mr. Clark, "he was as clear in mind and faculties as he had ever known him; his mind was perfectly sound and clear." Dr. Edgar, long and familiarly acquainted with his physical and mental characteristics, constitution, and habits, "considered him of sound mind," and Judge Winant, the other subscribing witness, concurred with them in opinion. Judge Winant, after the will was executed, conversed with him at large respecting his health, and in reference to several improvements in which he was interested in Virginia; in which conversation he indicated no defect of mental capacity, but full intelligence. He subsequently died while with the family. In addition to this proof, eight witnesses, residents of Virginia, knowing him well for many years, testified that, down to his leaving Deep Creek for the North, some ten days before making the will, his mental condition remained as good as they had ever known it; and Dr. Anderson, called as a consulting physician three days after the will was executed, represented his "intelligence to be perfect." This evidence, which was wholly uncontradicted, tends to sustain the conclusion that, instead of the deceased's being a

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person of permanently diseased intellect at the time of the execution of the will, there were no sensible indications that his rather unusual powers of mind had even begun to decay. He was, it is true, broken in health, having from youth been a sufferer from gout, which was hereditary, and which at length caused an affection of the heart and dropsy; the latter diseases developing themselves in connection, in the spring of 1859. Such constitution as he had was nearly broken down; and though death was not to be immediately apprehended, the issue was, as the physicians who examined his case, some three days after the execution of the will, expressed it, "to be merely a question of time." But no one intimates that his bodily infirmities had then, if ever, led to any mental disturbance, or enfeebled his intellect in any appreciable degree. Neither has the suggestion any foundation that indulgence in intoxicating liquors had then impaired his mind.

It appears that, although not totally abstaining, he had for most of his life been abstemious in the use of liquor.

A year or two before his death he indulged in a more free use of it, but not apparently to excess—at least, before the summer and fall after making the will. In 1858 he spent the months of May, August, and September at Rossville, when he could not have drank to any marked extent, for no one suggests that he was ever under the influence of liquor in the slightest degree. Prior to his visit to the North in 1859, he was shown to have been partially affected by it, in two or three instances, in Virginia, but was never seen intoxicated. Nor was he under its influence to any extent when the will was made.

In view of these facts, there is no color for saying that his indulgence in intoxicating liquors, previous to the factum, had affected his mind or his capacity to make a will. Nor, if it were at all important, does the evidence warrant the conclusion that his use of stimulants, during his stay and last illness at Rossville, after making the will, reduced his mind to a state of general incapacity for the performance of a testamentary act. Such a conclusion is at war with the general facts of the case. There is no pretence that his drinking (however extensive it may have been) incapacitated

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him for business, or prevented him from attending to or controlling his business affairs. It indisputably appears that his business operations went on as actively as ever, under his direction; and no matter relating to his affairs, North or South, however slight, anybody ventured to touch without his personal authority. Those who speak most unfavorably of his habits represent him as constantly exercising memory, will, discrimination, firmness, and all the attributes of perfect intelligence. The habit of drinking undoubtedly grew on him as he sank under his complicated ailments; but down to his departure for Virginia, some two months before his death, nobody pretends that he was imbecile. Indeed, the evidence distinctly indicates that up to this time he retained nearly his full strength of intellect.

The will, then, is not impeachable on the ground of testamentary incapacity. There is no room to doubt that when it was executed the testator was fully competent.

Bodily disease may have abated some of the former elasticity of his mind; but it was in no way *diseased*, or even in an incipient state of decay.

2. There being capacity, was the will the free act of the deceased; or was it the result of undue influence, exercised by his brother, the principal beneficiary?

This latter question was not argued with any apparent confidence by the Appellant's counsel, and I cannot well see how it could have been. Undue influence must be an influence exercised by coercion, imposition, or fraud. It must not be such as arises from the influence of gratitude, affection, or esteem; but it must be the ascendency of another will over that of the testator, whose faculties have been so impaired as to subject him to the controlling influence of force, imposition, or fraud (Gardiner *v.* Gardiner, 34 N. Y. 162; Dean *v.* Negley, 41 Penn. R. 312; Small *v.* Small, 4 Greenl. 220; Trumbull *v.* Gibbons, 2 Zabriskie's N. J. R. 117). Moreover, the exertion of the influence upon the very act must be proved, and it will not be inferred from opportunity or interest (Carroll *v.* Norton, 3 Bradford, 320; Clapp *v.* Fullerton, 34 N. Y. R. 199).

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I can discover nothing in the record that brings the case within the rules. The circumstances anterior to and attending the execution of the instrument are not consistent with any other hypothesis than that it was the product of the deceased's own will, and not of the force, fraud, or undue influence of any other. The fact is unquestioned that he was a man of more than ordinary vigor of intellect, of great firmness, self-reliance, and tenacity of purpose; and it is clear, from the evidence, that he retained his unusual powers of mind down to the period of making the will. He was not, therefore, in a condition to be exposed to undue influence. But the case is barren of evidence of any direct influence (much less that improper influence which will vitiate a testamentary act) exercised by the brother to procure the will. It may be that the deceased was unjust to his son, the Appellant, in the disposition of his property, and that the brother should not have been selected as the chief beneficiary; but there is nothing rising to the dignity of proof of any undue influence or connivance, on the part of the latter, to effect the result. In its disposition, as to the parts affecting the son and the brother, the instrument was similar to one made by the testator at Rossville, the fall previously, except that the annuity to the son was reduced from $1,400 to $700. It is possible that the brother knew what this will of 1858 contained, but there is nothing to base a conjecture upon that he interfered in any way to bring it about.

As to the will in question, the proof is equally decisive as to non-interference on the part of the brother. It appears conclusively that the alteration of the will, in 1859, by halving the son's annuity, was in accordance with the design of the testator, conceived in Virginia the winter previously—a design and result over which the brother could have had no possible influence in the nature of the case.

The instrument was drawn in the room of the deceased, he being alone with Mr. Clark, his counsel. The instrument proceeded solely from him. The brother was not present at any time during the two hours spent in the act. He knew that the testator was making his will, as did the testator's sister, Mrs.

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Guyon, who was in the house at the time; but that he was any more cognizant of the contents of the instrument being executed than the sister, there is not the slightest proof. True, the factum was at his house, but that was the deceased's only home and resort at the North. There was some evidence, also, that he conveyed the message to Mr. Clark to come and draw the will; but his agency in respect to that message was not only natural, but affirmatively shown to have been in obedience to the wish of the deceased, conceived in Virginia, before starting for the North.

In view of this state of facts, there is no ground for alleging that the deceased, in publishing the instrument, and dictating its contents, was not acting of his own free, uninfluenced will and wish.

There is much evidence in the case of matters transpiring at Rossville, subsequent to the will.

An allusion to it is unimportant. The point of inquiry as to testamentary capacity, and the exercise of undue influence or fraud, is before, or at the time of the factum.

Subsequent occurrences cannot affect the legal aspects of the case.

I am of the opinion that the questions of fact involved were rightly discussed by the Surrogate, and that the judgment should be affirmed.

Judges PORTER, HUNT, PARKER, and GROVER were also for affirmance. DAVIES, Ch.J., read an opinion for reversal, in which BOCKES, J., concurred.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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WILLARD HATCH, Respondent, v. DAN PRYOR, Appellant.

Evidence—Written Contract—Parol.

When the case shows that the findings of the referee are based upon testimony which was clearly illegal, the party in whose favor such illegal findings were made cannot avail himself of them to sustain his judgment.

Appeal from the Supreme Court. The complaint alleged that on the 15th of April, 1858, a note was made by one Clark Reason, and H. Addington, as his surety, for $130, with interest, payable one year from date, to Charles Arnold, or bearer, at the store of Thompson and Bennett, in Willink; that the note was transferred by Arnold, the payee, to the Plaintiff; that the Defendant is indebted to the Plaintiff on the note, in the sum of $130, with interest; and that such indebtedness originated upon a contract between Reason, the maker of the note, and Pryor, the Defendant, by which Reason transferred to the Defendant the horses for which the note was given, and the latter, in consideration thereof, agreed to pay the note to the Plaintiff, or any one else who might be holder and owner, and to save Reason harmless from the payment of the note and costs.

The answer contained a denial of each allegation in the complaint, and averred a release and discharge by Reason from the alleged agreement.

On the hearing before the referee, the note was read in evidence, under Defendant's objection, and Reason was called as a witness for the Plaintiff, and testified in substance that, some time after he gave the note, he told the Defendant he was much embarrassed with debt; that the Defendant told him he would take his property to pay certain debts, and would pay for the horses; and that accordingly he let the Defendant have twenty-one tons of hay, and other property, including the horses for which this note was given.

On cross-examination of the witness, it appeared that, at the time this arrangement was made, the bargain was reduced to

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writing, and that the property which he let the Defendant have, and the debts which the latter was to pay, were stated in the written agreement. He did not remember whether he signed it himself or not, but he was indebted to the Defendant, and the agreement was drawn up for them by an attorney, and delivered at the time to the Defendant.

A motion was thereupon made to strike out the parol evidence of the agreement between Reason and the Defendant, on the ground that the written contract was the appropriate evidence of such agreement.

The motion was denied, and the Defendant's counsel excepted.

The Plaintiff was then sworn as a witness, and testified, under objection and exception by the Defendant, that the Defendant on one occasion told him that he had made some arrangements with Reason to pay this note, and some other debts, and that he would pay the note if the Plaintiff would take certain property; but, on looking at the property, he declined to take it.

The Defendant proved the execution of a release by Reason from the agreement, so far as it related to the note in question, and the Plaintiff testified that he had no notice of such release.

The Defendant, at the close of the case, renewed his objections to the evidence, and insisted that upon the proof the Plaintiff was not entitled to recover. The referee overruled the objections, and, upon the foregoing proof, found as matter of fact that, in consideration of the sale and delivery of certain property by Reason, the maker of the note, the Defendant agreed to pay it; and that Reason, for a valuable consideration, subsequently released him from the undertaking, without notice to the Plaintiff. He held as matter of law that, under the agreement, the Defendant was liable to the Plaintiff upon the note, and that the subsequent release was ineffectual.

The Defendant excepted to the various rulings of the referee, and appealed to the General Term, where the judgment was affirmed.

J. M. Humphrey for Appellant.

Galusha Parsons for Respondent.

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PORTER, J.—Upon the facts found by the referee, the release executed by Reason would be ineffectual to impair the rights of the Plaintiff. But the finding is unavailing to the Respondent, as it is based on evidence which should have been excluded. He gave parol proof, on the hearing, of the agreement between the Defendant and Reason, on which he relied to establish his right of action. It afterward appeared that the contract was reduced to writing; and the Respondent neither produced it nor accounted for its non-production.

The referee erred in denying the Defendant's motion to strike out the parol proof thus received, and in giving effect to secondary evidence of a promise, embodied in a written contract, the terms of which were unascertained (Dunn *v.* Hewitt, 2 Denio, 637; Rogers *v.* Van Hoesen, 12 Johnson, 221; Jenner *v.* Joliffe, 6 ib. 9).

The judgment should be reversed, and a new trial ordered, with costs to abide the event of the action.

All the Judges concurring, except Judges HUNT and BOCKES, who expressed no opinion.

Ordered accordingly.

JOEL TIFFANY,
State Reporter.

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HARVEY W. HYDE, RESPONDENT, v. JOHN P. P. LATHROP, APPELLANT.

Replevin—Delivery—Title.

When property contracted to be delivered at a certain place, and at a certain price, has been delivered at the place so that it can be identified, and so that nothing further remains to be done except perhaps to measure or count, so as to determine the amount to be paid, the delivery is complete, and the title is fully vested in the vendee.

G. P. Comstock for Appellant.
I. R. Strong for Respondent.

DAVIES, CH.J.—This action is in the nature of replevin, for about 7,000 flour-barrel staves.

The Plaintiff, and Hitchings and Oliver, made a contract in writing, in these words: "$30. Received of H. W. Hyde, thirty dollars, to apply on thirty thousand flour-barrel staves, at seven dollars per thousand, gross count, which are to be delivered at the Buffalo, Corning, and Genesee Valley Railroad depot, within three weeks. Dated, Le Roy, June 26, 1856. To be delivered on the cars.

(Signed) "SCOVILLE HITCHINGS,
"WILLARD OLIVER."

The referee who tried the action found the following facts:

That on the 26th of June, 1856, the Plaintiff took from Hitchings and Oliver the contract above mentioned; that, at the time of the making of the contract, the Plaintiff paid to said Hitchings and Oliver $30; that on the 8th day of July afterward he paid them the further sum of $30; that on the 1st day of July, 1856, he paid them the further sum of $25; that on the 26th day of August, aforesaid, he paid them the further sum of $30; and on the 15th of September, of the same year, he paid them the further sum of $10.

After the execution of said contract, and in the month of July, 1856, the said Hitchings and Oliver delivered to the Plaintiff

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10,464 staves, under and upon said contract, upon a car at the railroad depot at Le Roy, and the same were taken to Scottsville, and received by the Plaintiff. That after the making of the said contract aforesaid the same was modified, so that the said Hitchings and Oliver were not bound to deliver the staves upon the cars, at the depot aforesaid, except the one load of 10,464, delivered in the month of July aforesaid, and that the balance of said 30,000 staves was to be delivered at the said railroad depot at Le Roy aforesaid. That after the delivery of the said 10,464 staves, and before the 21st of September, 1856, the said Hitchings and Oliver drew and delivered about 7,000 staves at the railroad depot in Le Roy, and piled them near the railroad track, in pursuance of said modified contract, and to apply on the same, being the same staves mentioned and described in the complaint. That upon said 7,000 staves, one Alonzo S. Upham had a claim or lien for $7.50, which was subsequently paid by the Defendant in this action. That on the 9th of November, 1855, Olmstead and Adams recovered a judgment, before a Justice of the Peace, against said Oliver, for $22.68, and execution was issued thereon, and the same was renewed from time to time, and was finally renewed August 14, 1856.

That on the 26th of August, 1856, one Clark also duly recovered a judgment, before a Justice of the Peace, against said Oliver, and execution was thereupon issued on said last-mentioned judgment to one Shumway, a constable, who had the execution on the previous judgment, and who had levied on 3,500 of the staves in controversy, and which levy had been made after said staves had been delivered at the depot at Le Roy, aforesaid. That on the 26th of August, 1856, said Clark recovered another judgment against said Oliver, before the same Justice, for $9.84, upon which execution was issued, on the 9th of September, 1856.

On the said 9th of September the executions upon the judgments of Clark were placed in the hands of Shumway, the constable, and he entered upon them on that day a memorandum of a levy on the same day.

On the 20th day of September, 1856, Shumway, the constable,

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sold, on the three executions before named, the whole of the staves in controversy, about 7,000 in number, 3,500 having been drawn to the depot between the day of the levy and the day of sale, and said staves were bid off for Defendant, and removed by him.

That Hitchings and Oliver were partners in getting out the staves in question, and said Oliver died a few days prior to October 4, 1856.

That on the 14th day of October, 1856, the said Hitchings, as survivor, made an assignment and transfer of all the right and title of said Hitchings and Oliver, of, in, and to said staves to the Plaintiff.

The referee found the property in the staves in question, at the time of the taking of them by the Defendant, to be in the Plaintiff, subject to the lien of $7.50 of the said Upham.

That the value of the staves at the time of the taking the same by the Defendant was $45, after deducting Upham's lien.

That the damages for the detention of the staves were $12.43.

The referee found as conclusions of law: 1. That at the time of the taking of the staves, the Plaintiff was entitled to possession of them as owner. 2. That the lien of Upham did not give to the Defendant the right to take and hold the staves. 3. That the payment of the lien of Upham did not operate as an assignment of the lien of Upham to the Defendant. The referee gave judgment for the Plaintiff in accordance with his report, and judgment thereon was affirmed at the General Term.

Upon the facts found by the referee, and those which we are authorized to assume he found, there is no serious embarrassment in sustaining this judgment. The real question in the case is, in whom was the property of the 7,000 staves at the time of the levy thereon by the constable—in the Plaintiff, or in Hitchings and Oliver? The referee has found as a fact that the property was in the Plaintiff, subject to the lien thereon of Upham for the $7.50.

If this were purely a question of fact, this finding is conclusive upon this point. But it cannot be questioned that the title to the staves would become absolute in the Plaintiff by a delivery of

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them, and an acceptance thereof. Now, the referee has distinctly found that such delivery was made, in conformity with the terms of the modified contract, and, to sustain the judgment upon the referee's report, we are warranted in assuming that he also found that the same had been accepted by the Plaintiff.

These facts show that the title of the staves was vested absolutely in the Plaintiff, and there was left no leviable interest in the Defendants, on the executions in the hands of the constable. The cases of Crofoot *v.* Bennett (2 Com. 258), and Tyler *v.* Strang (21 Barb. 198), are satisfactory and conclusive authorities, that the title to these staves vested absolutely in the Plaintiff, upon their delivery at the railroad depot. The general rule undoubtedly is, that if goods be sold while mingled with others, by weight, number, or measure, the sale is incomplete, and the title continues with the seller, until the bargained property be separated and identified (2 Kent's Com. 496); and the reason is, that the sale cannot apply to any article until it is clearly designated, and its identity thus ascertained. In Crofoot *v.* Bennett (supra), Judge Strong said: "But if the goods are clearly identified, then, although it may be necessary to number, weigh, or measure them, in order to ascertain what would be the price of the whole, at a rate agreed upon between the parties, the title will pass. If a flock of sheep is sold at so much the head, and it is agreed that they shall be counted after the sale, in order to determine the entire price of the whole, the sale is valid and complete."

In Tyler *v.* Strang (supra), a quantity of lumber was piled up and delivered, but the exact quantity, and the amount to be paid therefor, could not be ascertained until a measurement thereof had been made. The evidence tended to prove that the lumber was piled by itself, preparatory to shipping, and that possession of the whole of it was delivered. The Court say: "If such was the fact, a measurement was not necessary to vest the title in the Plaintiff. It is only when something remains to be done, which is by the contract a condition precedent to the passing of the title, that the title will not pass until the act be performed."

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In the case at bar, nothing remained to be done, after the delivery of the staves at the railroad depot, but to ascertain the quantity, for the purpose of determining the amount to be paid therefor.

By the contract the same were to be paid for "at seven dollars per thousand, gross count."

Under such circumstances, a count was not necessary to vest the title in the Plaintiff. The correct rule for determining whether the title passed to the vendee of articles to be manufactured by the vendor, is undoubtedly well stated by Judge Harris in Comfort v. Kiersted (26 Barb. 472). In that case the contract was for the manufacture and delivery of shingles, with a proviso that they should become the property of the vendee, as manufactured. Judge Harris says: "Before the title would vest, even after the shingles had been made, something must have been done which would amount at least to a constructive delivery. The shingles must have been in some way designated and set apart, so as to be capable of being identified as the property of the purchasers."

All these requirements are found in the case now under consideration.

It may be conceded that the admission of the newspaper, under date of Sept. 3, 1856, containing the advertisement of a circus to be held at Le Roy on the 8th of that month, for the purpose of identifying the day when the Plaintiff was in that place, was not competent evidence to prove the fact that a circus was held there on that day.

The Plaintiff had testified in his cross-examination that he was in Le Roy before the 15th of September, and said "it was on the day of the circus;" that "these staves were then there, on the west side of the depot; about 7,000."

It was not claimed, on the part of the Plaintiff, that he did anything with, or in respect to, the staves at the time he thus saw them.

The constable made his levy upon half of them on the 8th of September, and on the 9th upon the whole 7,000. It is therefore

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undeniable that the whole 7,000 staves had been delivered at the railroad depot anterior to the 8th day of September, in pursuance of the terms of the modified contract; and if such delivery vested the title to the staves in the Plaintiff, as it is believed it has been shown it did, then it follows that it was wholly immaterial upon what day the Plaintiff first saw the staves. The fact of his seeing them, or the time when, were not elements in the vesting the title to them in him, and the admission of this newspaper notice worked, therefore, no injury to the Defendant.

These considerations dispose of all the grounds urged upon us for a reversal of this judgment.

We do not see any sufficient reasons for such reversal, and we are therefore of the opinion that the judgment should be affirmed, with costs.

Affirmed.

JOEL TIFFANY,
State Reporter.

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WILLIAM DOUGHTY AND OTHERS, COM.'S, &C., v. ROWLAND BRILL.

Construction of Statute—Penalties for Encroachment on Highways.

The statute imposing penalties for encroachments upon highways applies only to cases where the highway has been regularly laid out according to law, and not to cases where the right of way is by prescription.

BOCKES, J.—This case comes before this Court on an appeal from a judgment in favor of the Defendant, dismissing the complaint, with costs.

The action was brought by the Plaintiffs, Commissioners of Highways of the town of Beekman, in the county of Dutchess, to recover penalties imposed by statute for an alleged encroachment upon the public highway. On the trial it appeared from the pleadings and proofs that the highway at the place of the alleged encroachment had been used as such by the public for a period exceeding twenty-five years, and that proceedings had been taken by the Commissioners, under the statute, by which the Defendant's fence was declared an encroachment on the highway, and that he had been notified to remove the same, which he refused to do.

It further appeared that the highway had never been laid out, or, as stated in the case, that there was no record of it on the town books. Judgment of nonsuit was ordered, on the ground that the statute authorizing recovery of penalties for encroachments on the public highway applied only where the highway was "laid out" according to law. The decision of this case by the Supreme Court (opinion by Mr. Justice Brown) is reported in 36 Barb. 488.

A careful examination of the case has led me to the conclusion adopted by the Supreme Court, and for the reasons clearly and tersely given in the opinion of Mr. Justice Brown.

That learned Judge has noticed the obvious distinction in the rules of law applicable to public highways, existing by prescriptive

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right, and those which became such by force and authority of proceedings under the statute for the laying out of highways, which statute provides for compensation for the damages occasioned thereby.

He shows very clearly that the section of the statute imposing penalties for encroachments, and under which the Plaintiffs claimed to recover, had application, according to its strict language, to a case "*where a highway shall have been laid out*," leaving to unlawful interference by obstructions, in highways established by prescription, the common law recovery for nuisance. The rule must also be held in mind that penal statutes are to have a strict construction.

Their application will generally be limited to cases falling within the letter. So it has been often held that penalties cannot be raised by implication. They must be expressly created and imposed.

The line of argument and suggestions of Mr. Justice Brown have also received the sanction of this Court in Talmage *v.* Hunting (29 N. Y. 447).

Although not there directly decided, the opinion is plainly insinuated that the provisions of law here under consideration in regard to encroachments must be deemed confined to laid out highways.

The judgment of the Supreme Court should be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

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THEODOSUS F. SECOR v. GEORGE LAW.

Liability upon agreement to pay third party—Power of Referee to allow Amendment—Code, §§ 272, 173.

Where a person receives money upon an agreement to pay the demands of a third party against those from whom he received the money, he is liable, upon such promise, to pay the same to the party entitled, irrespective of the legal obligations of the party paying the same.

J. H. Reynolds for Respondent.
Allen & Hutchings for Appellant.

GROVER, J.—The testimony excepted to by Defendant, which was received by the referee, related to two questions:

First. Whether the Defendant was individually liable upon the demands in suit, or only jointly with Roberts and others, as set forth in the answer; and,

Second. Whether the Defendant had any valid claim for damages consequent upon the failure of the Plaintiffs and their assigns to complete the boilers and machinery in question within the time fixed by the contract for that purpose.

The facts found by the referee, wholly independent of such testimony, conclusively determine the rights of the parties upon both questions, and it is therefore wholly immaterial whether such testimony was competent or not.

As to the first question, the referee found that, before the commencement of the action, the associates of Defendant paid him their respective shares of the demand in suit, and that he agreed with them to pay and satisfy the Plaintiff therefor. This rendered him individually liable to the Plaintiffs upon such demand, irrespective of the question whether he was so liable upon the contract (Lawrence v. Fox, 20 N. Y. 268). In that case it was decided by this Court, that an action could be maintained upon a promise made by the Defendant, upon a valid consideration to a third person, for the benefit of the Plaintiff, although the latter was not privy to the consideration. It was further held, in the same case,

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that a creditor could maintain an action against a person who had borrowed money of his debtor, on a promise to pay the amount to the creditor.

The present case falls directly within the principle of this case. Thus, from the facts found by the referee, the Defendant was allowed this demand by his associates, upon a settlement between them, and was paid by them their respective shares, and in consideration thereof he promised to assume and settle the demand with the Plaintiffs. The Defendant was individually liable to the Plaintiff upon this contract.

The referee had the same power to allow an amendment as the Court has upon a trial (Code, § 272). The Court (§ 173) has power upon trial to amend by inserting additional allegations, and to conform the pleadings to the proof. These sections authorized the amendment allowed by the referee.

Upon the question of damages for the delay claimed by the Defendant, the referee found, in substance, that the parties settled their respective demands, including the claim for damages, and liquidated and agreed upon the sum due the Plaintiffs, which the Defendant, in consideration thereof, promised to pay. This Court is concluded by such finding, as it was made upon conflicting evidence, and the facts so found constitute a bar to the Defendant's claim for damages.

The conclusions of law by the referee upon the facts found were correct.

The judgment must be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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SAMUEL PINDAR, ASSIGNEE, &c., RESPONDENT, v. THE KINGS COUNTY FIRE INSURANCE COMPANY, APPELLANTS.

Insurance—Condition—Construction.

When a policy of insurance is upon a building and a stock of goods, etc., such as is usually kept in country stores, it covers all articles of merchandise coming within such description, even though it include articles generally prohibited except at special rates.

IN November, 1860, Alfred Pindar procured from the Defendant a policy of insurance against loss by fire upon a building in Rhinebeck for one thousand dollars for one year; also for fifteen hundred dollars on his stock, such as is usually kept in country stores, for one year. The policy contained a clause providing that if the premises, at any time during the period for which the policy would otherwise continue in force, should be used for storing or keeping therein any article, goods or merchandise denominated hazardous or extra-hazardous, or specially hazardous in the second class of hazards annexed to the policy, except as therein specially provided for, the policy should be void while the premises were so used. Among the articles so specified as extra-hazardous was spirits of turpentine, and among those specially hazardous, gunpowder. The premises and stock of goods were consumed by fire during the life of the policy. At the time of the fire, about twenty gallons of spirits of turpentine and fifteen pounds of powder were kept upon the premises. After the fire, Alfred Pindar assigned the claim upon the policy to the Plaintiff. Upon the trial, the Plaintiff proved that spirits of turpentine and gunpowder were articles usually kept in country stores. The counsel for the Defendant duly excepted to this proof. Upon the trial, it became a question as to the quantity of blankets in a small room upon the premises at the time of the fire. The Defendant's counsel inquired of a witness what number of blankets pressed could be got into the room. The Plaintiff's counsel objected to the question, and it was overruled by the Court and the Defendant's counsel excepted. The counsel for the Defend-

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ant moved for a nonsuit upon the ground that the policy was not in force at the time of the fire, for the reason that prohibited articles were, at the time, kept upon the premises. The motion was denied by the Court, and the Defendant's counsel excepted. The jury rendered a verdict for the Plaintiff, upon which judgment was entered, which was affirmed, upon appeal, by the General Term, and the Defendant appealed therefrom to this Court.

H. A. Nelson for the Respondent.

Thompson & Weeks for the Appellants.

GROVER, J. The description of the goods insured by the policy was such goods as are usually kept in country stores. To determine what particular goods were covered by the policy, it was necessary to ascertain what goods were usually kept in country stores. This rendered proof of what was so kept necessary and competent. The objection to this evidence was therefore properly overruled. The evidence showed that spirits of turpentine and gunpowder were usually kept in country stores. These articles were thus brought within the description of the policy and covered by it. It was wholly immaterial whether, when stocks of country stores were insured, it was usual to make some special agreement in relation to these articles. The inquiry was, simply, whether they were usually kept in country stores, not how they were insured when so kept, if at all. Aided by the proof given, the policy in question must be construed as insuring spirits of turpentine and gunpowder, together with the other goods, as much as though these articles had been specifically mentioned as insured in the policy. In Harper *v.* The Albany Mutual Insurance Company (17 N. Y. 194), it was held that a policy upon premises privileged for a printing-office, upon its being shown that the use of camphene was necessary in conducting the business, implied an assent by the insurer to its being kept upon the premises for such use, although the restriction to its being kept upon the premises was similar to that as to spirits of turpentine and gunpowder in the present case, and that so keeping and using it did not avoid the policy. In Harper *v.* The New York

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Insurance Company (22 N. Y. 441), a similar rule was not only held, but a majority of the Court went further, and held that, although the policy contained a printed clause exempting the insurer from damage from loss sustained from camphene kept upon the premises for use, yet that this exemption did not apply to a loss from fire caused by igniting camphene, so kept, accidentally by a lighted match. It is not necessary to go to any such extent in the present case. We have seen that, in the present case, the policy, properly construed, covered gunpowder and spirits of turpentine, and when these articles are insured, a printed clause, prohibiting their being kept, is plainly repugnant to the written clause insuring them, and, by the authority of the cases above cited, the printed clause must be governed by the written. The policy was, therefore, not void at the time of the fire, by reason of keeping the spirits of turpentine and gunpowder. It cannot be held that the effect of the printed clause in the present case is to except spirits of turpentine and gunpowder from the general description of the property insured without overruling Harper *v.* The Albany Insurance Company, and Same *v.* The New York Insurance Company (supra). The insurer is presumed to have known what articles were usually kept in country stores, and consequently that the policy covered the powder and turpentine. The Court properly held that the opinion of the witness as to the quantity of blankets that could be put in the room in question was inadmissible. It did not appear that he had ever packed blankets, or knew any more about the space required for any given quantity than any of the jurors. Though impressed with the idea that the quantity claimed and recovered for by the Plaintiff could not have been put in the space in question, no relief can be given on that ground by this Court. It was a mere question of fact, which cannot be reviewed here. The judgment must be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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CAZET AND ASTOIN v. HUBBELL AND OTHERS.

PUTNAM AND OTHERS v. MEDBURY AND OTHERS.

HAMILTON v. SAME.

SAWYER v. HUBBELL AND OTHERS.

Foreclosure—Judgment—Purchaser—Jurisdiction.

One who purchases under a judgment of foreclosure, thereby submits himself to the jurisdiction of the Court; and he may be compelled, on motion, to comply with the conditions of sale.

When the purchaser is in possession, under a decree which has not been fully executed, mere lapse of time is no answer to a motion to compel the payment of the amount of his bid.

When a motion is made, by those having an interest in the fund, that the money be paid into Court, it constitutes no valid objection that one of the original parties is dead, and that the action has not since been revived.

APPEAL by Alrick Hubbell from an order of the Supreme Court, in the Eighth district, affirming an order at Special Term, requiring the Appellant to pay to the treasurer of Monroe county, subject to the order of the Court, the unpaid balance of his bid, on a purchase under a judgment of foreclosure, amounting to $6,362.55, with interest from the 14th of July, 1849; being the surplus moneys on such sale claimed by the Respondents Cazet, Putnam, Hamilton and others, who were judgment creditors of the mortgagor.

It appeared by the papers on which the motion was founded, that Cazet and Astoin, two of the Respondents, recovered judgment in the Supreme Court against Alfred Hubbell, on the 15th of January, 1849, for $1,125.64; that Hollister and Churchill recovered a like judgment for $896.30, on the 25th of that month; that on the same day John Williams recovered a like judgment for $193.27, and Putnam and Whitney a like judgment for $418.27; that Joseph Putnam recovered a like judgment for $416.55, on the 16th of the same month; and Samuel Hamilton

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a like judgment for $1,042.49, on the same day. Each of the judgments was duly docketed at the time of its recovery, in the office of the clerk of the county of Monroe, in which the debtor resided, and the executions thereon were respectively returned unsatisfied.

On the 12th of the same month, Hubbell, the debtor, assigned his real and personal property to Messrs. Smith and Medbury, ostensibly for the benefit of his creditors.

On the 2d of May, 1849, James W. Sawyer commenced an action for the foreclosure of a mortgage on real estate of Alfred Hubbell, situate in the county of Monroe, and obtained the usual judgment on the 20th of June, 1849. Under this judgment the premises were sold by George Hart, then sheriff of Monroe county, and were purchased by the Appellant, Alrick Hubbell, on the 14th of July, 1849, for the sum of $10,100. Of this amount, the sum of $87.67 was applied in payment of the attorney's costs; $106.65 in extinguishment of taxes on the property; $118.36 in satisfaction of the fees and disbursements of the sheriff; and $3,424.77 in payment of the judgment of foreclosure, which Alrick Hubbell then owned, and for which he gave his receipt to the sheriff. The balance of the purchase-money, amounting to $6,362.65, with interest, and constituting the surplus fund on the foreclosure sale, has never been paid over, but is still retained by the Appellant. He received from the sheriff the usual conveyance, and has since sold most of the property. Alfred Hubbell, the mortgagor, and the sheriff who made the sale, both died insolvent, and two of the sheriff's sureties are dead. The judgment directed that the surplus moneys arising from the sale should be brought into court to abide its further order.

Suits in equity were commenced in 1849 by Putnam and others of the Respondents, and in 1850 by the Respondent Hamilton, for the purpose of setting aside the assignment of Alfred Hubbell to Messrs. Smith & Medbury, and of reaching the real and personal property, which he had sought to withdraw from the reach of judgment and execution. The assignees and the Appel-

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lant, Alrick Hubbell, were brought in as Defendants. These suits resulted in judgments in favor of the respective Plaintiffs in February, 1862. The referee, Judge Foor, found, as matter of fact, that the transfer was made with a fraudulent intent on the part of the assignor, and that Alrick Hubbell, the present Appellant, confederated with the assignor in the fraud, and in placing his property beyond the reach of his creditors. The judgment declared the invalidity of the assignment, directed the appointment of a receiver, and held Alrick Hubbell accountable, as a trustee, for any deficiency in the payment of the Plaintiffs' judgments from the other property of the assignor. From that judgment the respective Defendants appealed, and the usual undertakings were given to stay execution.

A similar action was commenced by the Respondents Cazet and Astoin against the assignees, which was pending and undetermined at the time the motion was made.

The property which came to the hands of the assignees appears to have amounted to about $2,500, from which they are entitled to allowances under the judgments declaring the invalidity of the assignment.

The Appellant, in his opposing affidavit, did not deny that the balance of the purchase-money, constituting the surplus fund on the sale, was in fact unpaid, but he alleged that, "after the sale, he settled with George Hart, sheriff, who made the sale, and gave to said Hart a promissory note, with surety, for the amount of the surplus money, and took a deed of said premises, which note said Hart received in payment of the bid made by deponent on said sale." He adds, that Hart executed and delivered a deed of the premises, and gave him a receipt in full for the amount of his bid on said sale. He claimed to hold large claims and demands against Alfred Hubbell which were still unpaid, and denied that the judgment of Cazet and Astoin was the oldest unsatisfied judgment against him, but specified none of an earlier date which remained unpaid.

The motion was granted on the hearing before Mr. Justice Welles, at the Monroe Special Term, and, the order having

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been affirmed at the General Term, an appeal was taken to this Court.

Lyman Tremain for the Appellant.
Wm. F. Cogswell for the Respondents.

PORTER, J. The Appellant acquired his title to the mortgaged premises under a judgment which directed that the surplus moneys should be paid into court. He took the benefit of the purchase, but by a secret and collusive arrangement with the sheriff he retained the surplus, amounting to $6,362.55, with interest from the 14th of July, 1849. That officer had no authority to remit the payment of any portion of the price, or to accept a note to himself in extinguishment of the Appellant's obligation. By becoming the purchaser, Alrick Hubbell, though not named as a party in the action, submitted himself to the jurisdiction of the Court in the foreclosure suit; and the appropriate remedy, to compel him to pay over the surplus money, was the motion made by the Respondents (Requa *v.* Rea, 2 Paige, 339; Brasher *v.* Cortland, 2 Johns. Ch. 505; Casamajor *v.* Strode, 1 Simons & Stuart, 381; Lansdown *v.* Elderton, 14 Vesey, 512).

It was urged with great force and ability, on the argument, that the obligation to complete the purchase was extinguished by the lapse of time. In this view we cannot concur. The Appellant retains the benefit of the title he acquired through the judgment of foreclosure; and nothing has occurred since which gives him a better right, now than then, to disregard the directions of the tribunal by which that judgment was pronounced. For all the purposes of this proceeding, the action is to be deemed still pending; and there is no statute of limitations ousting the Court of jurisdiction to enforce the execution of its decree. It is no answer to the motion, that such a defence might have prevailed if the parties aggrieved had sought a concurrent remedy, by action against the sheriff for breach of duty. The Respondents have been guilty of no laches. The right to the surplus moneys was presumptively in the assignees until the assignment was adjudged to be fraudulent; and when its inva-

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lidity was legally ascertained, the Respondents promptly resorted to their motion. It is urged, with much force, that Cazet and Astoin were not even then in a position to move, as their action was still undetermined; but this furnishes no ground for reversing the order, as other parties united in the application, who were entitled to the precise relief demanded.

We think there is no force in the objection, that the motion was made without first bringing in, as parties, the representatives of Alfred Hubbell, who was one of the Defendants in the foreclosure suit. Their substitution was unnecessary for the purpose of compelling the Appellant to complete his purchase by bringing the money into court, and their rights are unaffected by the order, which simply secures the fund by placing it in the custody of the law, without awarding it to either of the claimants (Lynde *v.* O'Donnell, 21 How. 36–39; Brown *v.* Andrews, 1 Barb. 227; McGregor *v.* Comstock, 28 N. Y. 238; Hancock *v.* Hancock, 22 id. 570).

By mistake in entitling the cause, Alrick Hubbell is named in the motion papers as one of the Defendants in the foreclosure suit. The error is one which we are bound to disregard, as it prejudiced neither of the parties, and affected none of their substantial rights (Code, §§ 173, 176; Bank of Havana *v.* Magee, 20 N. Y. 360).

We think the other points urged in support of the appeal untenable; but as the rights of the parties claiming interests in the fund are not yet finally determined, the order should be modified by allowing the Appellant, if he should so elect, to give a bond to the people, with two sufficient sureties, to be approved by a Justice of the Supreme Court, and to be filed in the office of the clerk of the county of Monroe, securing the payment of the amount named in the order, with interest, as that Court may direct, and the observance of such orders as may be made from time to time in the premises.

With this modification, the order of the Supreme Court should be affirmed.

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All the Judges concurring except DAVIES, Ch. J., and BOCKES, J.,

Ordered accordingly.

BOCKES, J., read an opinion for reversal, holding—*first*, that Cazet and Astoin had no standing in court to make or join in the application against Hubbell; and *second*, that as regards the other parties, their right to move was lost to them by a lapse of time.

JOEL TIFFANY,
State Reporter.

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CHARLES A. L. GRAM ET AL., APPELLANTS, v. THE PRUSSIA EMIGRATED EVANGELICAL LUTHERAN GERMAN SOCIETY, ETC., AND OTHERS, RESPONDENTS.

Religious Corporations—Trustees—Cestui que trust—Change of Doctrine.

A religious society incorporated under the General Act of 1813 (April 5), is a corporation of all the members of such society, and not of the trustees, or a limited portion of the members.

The trustees of such society cannot take a trust for the sole benefit of members of the church, as distinguished from other members of such congregation.

Nor does such statutory incorporation contemplate or recognize the devotion of the corporate property to the support of a perpetual and unchangeable system of religious faith and doctrine.

A majority of the corporators, without respect to their religious tenets, have the entire control over the revenues of the corporation.

G. D. Lamott for the Appellants.

P. L. Ely for the Respondents.

PARKER, J.—We may assume, from the facts found by the referee, that the religious incorporation named as one of the Defendants in this case received and held, so far as it might legally do so, the property which it held, under certain trusts, for the propagation and support of the German Evangelical Lutheran faith, including doctrines and government, as held and practised by the German Evangelical Lutheran churches under the Synod of Buffalo and its ministry.

Also, that the action of the Defendants' trustees, in prohibiting the Plaintiff Gram, pastor of the church, from performing his functions as such pastor in the church edifice, and excluding the Plaintiff Hoge, the school-teacher, chorister, and sexton of said church, from the performance of his functions as such teacher, chorister, and sexton, was in violation of the rules of ecclesiastical government of the Lutheran churches, and of the rights of the Plaintiffs under the same.

The referee, conceding these facts, held, as a conclusion of law, that the Plaintiffs were entitled to no relief, for the reason that

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the trusts sought to be created were unauthorized by law, and void; and the property vested in, and was held by, the said incorporation unaffected thereby.

Unless the Plaintiffs can sustain the trusts which they allege the Defendants have violated without invoking to their aid the law of *charitable uses*, as an existing operative system, independent of our statutes of uses and trusts, they cannot under the law, as settled by the decisions of this court, sustain them. The subject of charitable uses was very thoroughly examined in the recent case of Bascom *v.* Albertson (34 N. Y. 584), and the conclusion clearly and definitely reached, that they are not excepted from the provision of our statute that uses and trusts, except as authorized and modified by the statute itself, are in this State abolished.

We are brought then to the inquiry, whether the trusts in question can be sustained as being authorized by statute. Manifestly, no authority for the creation or allowance of such trusts as these can be found in the article of the Revised Statutes entitled "Of uses and trusts." Is there anything in the charter of this religious incorporation by which they can be sustained?

The society was incorporated under the general act providing for the incorporation of religious societies, passed April 5, 1813. This act was not repealed by the Revised Statutes, but has remained in operation from the time of its passage to the present time, and, undoubtedly, whatever powers are given by it to the religious societies incorporated under it, are entirely unaffected by the provisions of the Revised Statutes in relation to trusts and perpetuities (Tucker *v.* St. Clement's Church, 3 Sand. S. C. 242; S. C. 4 Seld. 558). Every conveyance of lands to such corporations creates a perpetuity, and necessarily implies a trust, although none be expressed. The trusts, however, upon which the trustees of such societies hold the property committed to their charge, cannot be referred to any class of those cases which are authorized by the Revised Statutes, but are dependent entirely upon the provisions of the Act of 1813, above referred to.

It is necessary, then, to ascertain what is the scope and intent

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of that act, in reference to the property which it allows the religious societies incorporated under it to receive and hold. The trustees of every such society are, by the fourth section of the act, authorized to take into their possession all the temporalities belonging to the society, whether real or personal estate, and whether given, granted, or devised directly to the society, or to any other person for their use; and to receive, hold, and enjoy all churches, meeting-houses, parsonages, and burying-places, with the appurtenances and estates belonging to the society, in whatsoever manner the same may have been acquired, or in whose name soever the same may be held, as fully and amply as if the right or title thereto had originally been vested in the said trustees; and also to purchase and hold other real and personal estate, and to demise, lease, and improve the same for the use of such society, or other pious uses; also to repair and alter the churches or meeting-houses, and to erect others if necessary, and to erect dwelling-houses for the use of their ministers, and school-houses and other buildings for the use of the society, and to make rules and orders for managing the temporal affairs of the society, and to dispose of all moneys belonging thereto, and to regulate and order the renting of the pews in their churches or meeting-houses, and the perquisites for the breaking of ground in the cemetery or churchyards, and in the churches and meeting-houses, for burying the dead; and all other matters relating to the temporal concerns and revenues of the society.

The third section provides the mode by which a religious society may become incorporated at a meeting of the male persons of full age belonging to the church, congregation, or society, held at the church, meeting-house, or other place where they statedly attend for divine worship; and also who are entitled to vote for trustees at the election then held, being every male person of full age who has statedly worshipped with such church, congregation, or society, and has formerly been considered as belonging thereto. And the seventh section provides, in regard to voters at every succeeding election of trustees, that none shall vote except those

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who have been stated attendants on divine worship in the said church, congregation, or society, at least one year before such election, and shall have contributed to the support of the church, congregation, or society, according to the usages and customs thereof.

In the case of Robertson v. Bullions (1 Kern. 243), in determining the questions presented to the Court, in respect to the removal of trustees of religious corporations, and their obligations to account, it became necessary to pass, to some extent, upon the powers, duties, and functions of such trustees, the tenure by which they hold the corporate property, and the nature of the trusts committed to their charge. One of the questions arising in the case, and which was discussed and decided, was, whether the trustees alone constitute the corporation, and, as such, hold the property in trust for the society existing as a voluntary association, their relation to the society being simply that of a trustee to his cestui que trust, or not, and it was held "that a religious corporation, under our statute, consists not of the trustees alone, but of members of the society; that the society itself is incorporated, and not merely the trustees and its members are the corporators; that the relation of the trustees to the society is not that of a private trustee to the cestui que trust, but they are the managing officers of the corporation, and trustees in the same sense in which the president and directors of a bank or railroad company are trustees, and are invested, in regard to the temporal affairs of the society, with the powers specifically conferred by the statute, and with the ordinary discretionary powers of similar corporate officers."

It was also held in that case "that the trustees of a religious corporation, under our statute, cannot take a trust for the sole benefit of members of the church as distinguished from other members of the congregation, nor for the benefit of any portion of the corporators to the exclusion of others, no trust being authorized by the statute except for the use and benefit of the whole society."

Now, although it is evident from the provisions and general

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scope of the act, that the use to which the property of the society, in the hands of the trustees, is to be devoted, is the promotion of religion through the observance of divine worship, and the ministrations and teachings of the ministers and other teachers of religion, and undoubtedly any diversion of the property of the society by the trustees from this general object would be such an abuse of their trust as a court of equity would correct; yet it is equally evident that the statute, as thus construed by the Court, does not contemplate or recognize a devotion of such property which shall be absolutely perpetual and unchangeable to the support of a particular system of religious faith and doctrine, or ecclesiastical rule and discipline. If the relation between the trustees and the society is not that of a trustee to the cestui que trust, but the society itself is the corporation, and if the trustees cannot take and hold a trust for the sole benefit of a portion of the corporators to the exclusion of others, it seems to follow that a trust in favor of persons of a particular religious faith is not within the scope of the statute. The idea of such a trust necessarily implies that if a division occurs in the society holding the same faith at the beginning, the portion adhering thereto must remain the cestui que trusts, to the exclusion of those who do not so adhere; and the trustees must administer the property exclusively for them. This, as we have seen it, is held in the case last cited, and, as is plain from the statute, cannot be done. And I think the additional proposition stated by Judge Selden, and concurred in by three of his associates in that case, logically follows from those which were held and decided, to wit: "That the trustees of a religious corporation in this State cannot receive a trust limited to the support of a particular faith or a particular class of doctrines, for the reason that it is inconsistent with those provisions of the statute which give to the majority of the corporators, without regard to their religious tenets, the entire control over the revenues of the corporation."

This construction was sustained in the case of Petty v. Tooker (21 N. Y. 267). That case involved the inquiry whether the trustees and a majority of the society could change from Congre-

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gationalists to Presbyterians, and retain possession of the church property against those who adhered to the faith of the founders of the church and society, and it was held without dissent that they could: "That corporations formed under the third section of the Act of 1813 have no denominational character, nor can any such character be engrafted upon them. That portion of the members organized into a separate body called the church may belong to a peculiar denomination, but it has no power to impress its distinctive character upon the corporation, so as to render it ineffaceable by the voice of a majority of the corporators."

Now, the trust sought to be created in the case at bar was a trust limited to the support of a particular religious denomination, to such parts of the society as should adhere to the doctrines, faith, and government of the Evangelical Lutheran Church, with the unaltered Augsburg Confession, and remain subject to the religious government of the synod of Buffalo and its ministry. This, it is evident, is a trust not allowable under the construction of the statute which has been settled by this court.

The action of the Defendants' trustees, in excluding the Plaintiff Gram from the church edifice and the exercise of his functions as pastor therein, and the Plaintiff Hoge from the schoolhouse and the discharge of his duties as teacher therein, is found by the referee to have been under the direction of a majority of the members of the church and corporation.

There is nothing, therefore, in the acts of the trustees complained of which the Court can regard as a breach of trust or violation of duty. The referee was right in his decision that the Plaintiffs were entitled to no relief, and in dismissing their complaint.

The judgment appealed from should be affirmed, with costs.

All concur.

Affirmed.

SCRUGHAM, J., not voting.

JOEL TIFFANY,
State Reporter.

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HENRY P. SMITH, Respondent, v. ALBERT H. TRACY, Executor, etc., Appellant.

Principal and Agent—Transfer of Stock—Warranty.

An agent, with express authority to sell, has no implied authority to warrant, where the property is of a description not usually sold with warranty.

One employed to make a sale of bank stock is not, presumptively, empowered to warrant it in the name of his principal.

The receipt of the proceeds, by the owner of the stock, in ignorance of an unauthorized warranty by the agent, is not a ratification of the unauthorized engagement.

When a party claims, receives, and retains the property of another, knowing that it was obtained by an unauthorized use of his name, it is a ratification of the assumed agency, which evinces his assent to the original contract.

So, too, when an agent, acting within the scope of his actual authority, perpetrates a fraud for the benefit of his principal, and the latter receives the fruits of it, he thereby adopts the fraudulent acts of the agent.

But the mere receipt, by the owner, of the proceeds of his own property, is not a ratification of a collateral contract made without his authority, and to which he never knowingly assented.

Appeal from the Supreme Court. The action was for breach of warranty on the sale of two hundred shares of stock, owned by the late Albert H. Tracy, in the Hollister Bank of Buffalo, of the nominal value of $10,000.

The cause was tried at the Erie Circuit, in June, 1865, before Mr. Justice Grover and a jury. The sale of the stock was claimed to have been made on the 9th of January, 1857. On that day Mr. Tracy received his pay. He continued to reside in Buffalo until his death, in September, 1859. The failure of the bank occurred in August, 1857, and the claim on which this suit was founded was first made in April, 1860. The Plaintiff relied upon the president and cashier of the bank as witnesses to establish their authority to make the sale, and, upon his own testimony in conjunction with theirs, to show that Hollister made certain representations, which amounted to a warranty. The Defendant claimed that the sale was made by Tracy to Hollister, and by Hollister in his own behalf to the Plaintiff.

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It appeared on the trial that, in the early part of January, 1857, Mr. Tracy, who was a director in the bank, and a shareholder to the amount of $28,000, became dissatisfied in relation to a loan of $6,000, or thereabout, which had been made to a connection of Mr. Shearman, the cashier. The president, Mr. Hollister, told him he was getting old and nervous, and perhaps he had better sell his stock. Mr. Tracy declined doing so without seeing Mr. Wilkinson; but, after seeing him, he consented to sell it, and, for that purpose, on the 9th of January he handed to Hollister his scrip, and executed written transfers in the books of the bank, leaving no blank except for the name of the purchaser. Hollister claimed that he authorized him to sell the stock at par, with interest from the date of the preceding August dividend.

Hollister sold a portion of the stock to one Townsend, a portion to the Plaintiff, and the balance he retained, purchasing it nominally for himself, on his own paper endorsed by his brother, but substantially for the benefit and with the funds of the bank.

Shearman, the cashier, had been previously endeavoring to induce the Plaintiff to become a stockholder, and on the 9th of January the latter called, at his request, and had an interview with the president and cashier, who desired him to take $10,000 of the stock. He told Shearman, in substance, that he did not know the condition of the bank, and would like to know what it was. Shearman said it was perfectly sound, that it had a surplus of $35,000 to $40,000, and that unless the sky fell it would continue to pay ten per cent. dividends. The Plaintiff told him he was unprepared to pay for $10,000 of stock at that time; that he had made up his mind to take stock, but he would only take $5,000, and would pay him for it. The cashier then mentioned to the president—who seems not to have taken part in the previous conversation—that the Plaintiff declined taking the other $5,000. Hollister then said, as the Plaintiff testifies: "We expected you would take $10,000; that Mr. Shearman talked to him about $10,000; he said he would be glad to have me take $10,000, as they depended upon it." "I then asked him what

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the condition of the bank was, and told him I was unacquainted with it. He replied that the condition was good, and the investment would be a good one. I then said to Shearman that I would take $10,000, and I would pay him $5,000 then, and the balance in thirty days." He then paid them $5,000, and received a certificate of stock for that amount. He made no inquiries as to their authority, and did not see the transfers in blank, or the scrip left by Tracy with Hollister. The only writings which passed between them were the stock certificate from the bank for $5,000 and the check given for the price. After the Plaintiff took the certificate, they told him it was Tracy's stock, and that he had been induced to sell it by his embarrassment in connection with the Wabash Railroad Company. It was proved that the bank officers made the representations, believing them to be true; though it turned out, after the failure of the bank in the financial crisis of 1857, that its capital had been impaired, and the shareholders were afterward subjected to serious personal liabilities.

There was no evidence of any authority from Tracy to give a warranty, or of any knowledge on his part, then or afterward, that one had been given. It was proved that it was not usual to give a warranty on the sales of bank stocks, and the representations did not purport to be made in the name of Mr. Tracy. There was no personal communication at any time between the Plaintiff and the testator; and all that the latter did, after leaving the scrip and transfers of the $28,000 of stock, was to receive on the same day, from Hollister, the agreed price for the entire amount, embracing, among other items, the Plaintiff's check for $5,000.

The jury found for the Plaintiff, and a new trial was denied at the General Term, Davis, J., dissenting. The questions of law raised on the trial, so far as they are deemed material, are considered in the opinion.

John Ganson for the Appellant.
Chauncey Tucker for the Respondent.

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PORTER, J.—We concur with the Court below in the opinion that Hollister had no authority to warrant the stock, which his principal empowered him merely to sell. The rule applicable to such a case is stated with discrimination and accuracy in our leading text-book on the law of contracts: "An agent employed to sell, without express power to warrant, cannot give a warranty which shall bind the principal, unless the sale is one which is usually attended with warranty" (1 Parsons on Contracts, 5th ed. 60). It was proved that no such custom exists in connection with the sale of bank stocks, and that the special agent, in this instance, had nothing but a naked authority to sell.

We also concur in the conclusion of the able and learned Judge, who delivered the prevailing opinion, that there was not a ratification of the contract by the principal, with knowledge of the unauthorized act of the agent. No fraud is imputed by the Plaintiff, either to the agent or the principal. He sued the executor on a contract which the testator did not make, and he took upon himself the burden of showing that another had power to make it for him. As the testator was chargeable with no negligence or wrong, and as he did nothing at any time to mislead the Plaintiff or the public, or to accredit Hollister as empowered to make general engagements in his behalf, the only mode of connecting him with the warranty was by showing that he authorized it before it was given, or that he assented to it afterward. He did neither, but lived and died in utter ignorance that such a contract had ever been made.

The recovery was obtained on the theory that the warranty was within the terms of the authority. It was sustained by a divided Court on the theory, that though the testator neither authorized nor assented to the contract, and never knew of its existence, his act, in receiving the proceeds of an authorized sale of his own property, estopped his executor from denying the collateral engagement, unlawfully entered into by another in his name. We think this view cannot be maintained. It is founded on a misapprehension of the principles, settled by a series of decisions in a class of cases to which this does not belong. When a party

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claims, receives, and retains the property of another, knowing that it was obtained by an unauthorized use of his name, it is a ratification of the assumed agency, which evinces his assent to the contract or the wrong. The courts, however, have been careful, in the leading cases of that class, to note, as the precise ground of legal liability, the knowledge of the facts by the party appropriating the benefit (Murray *v.* Binninger, 36 N. Y. 61; Fitzhugh *v.* Sackett, id.; Bank of Beloit *v.* Beale, 34 id. 473, 475; Keeler *v.* Salisbury, 33 id. 653; Farmers' Loan & Trust Co. *v.* Walworth, 1 id. 446; Palmerston *v.* Huxford, 4 Denio, 166, 168). So, when a party takes the benefit of an unauthorized loan or purchase, obtained on his credit by his known servant or employee, it is held that his subsequent adoption of the transaction is equivalent to an original authority (Bolton *v.* Hillersden, 1 Ld. Raym. 224; Precious *v.* Abel, 1 Esp. 350; Rimell *v.* Sarpayo, 1 Carr. & Payne, 254). The cases on which the Respondent mainly relies, are those in which it has been held that when an authorized agent, *acting within the scope of his authority*, perpetrates a fraud for the benefit of his principal, and the latter receives the fruits of it, he is liable as for his own wrong (Bennett *v.* Judson, 21 N. Y. 238; Elwell *v.* Chamberlain, 31 id. 611).

These authorities rest upon the principle that when a party clothes another with authority to speak in his behalf, and endorses him to third persons as worthy of trust and confidence, those who are misled by the falsehood and fraud of the agent are entitled to impute it to the principal. The latter will not be permitted to retain the fruits of a transaction infected with fraud, whether the deceit which he seeks to turn to his profit was practised by him or by his accredited agent. In such a case he cannot separate the legal from the illegal elements of the contract, and appropriate the advantages it secures, while he rejects the corrupt instrumentalities by which they were obtained.

But when, as in the present case, there is a mere special authority to sell particular property, of a kind not usually sold with warranty, the buyer, who alleges a warranty by the agent,

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must show that the engagement was one he was empowered to make in behalf of his principal. The receipt of the proceeds of the sale, in ignorance of any such undertaking, is neither an assent to the breach of duty nor an extension of the authority of the agent. The question is one as to the existence and extent of the power, and not as to a fraud practised by an agent acting within the scope of his authority.

The distinction between the different classes of cases, to which we have referred, is sharply defined in two leading decisions, both made by the same judges and at the same term of the court (Bennett *v.* Judson, 21 N. Y. 238; Condit *v.* Baldwin, id. 219, 224, 225). In Bennett *v.* Judson, the Defendant employed an agent to negotiate the sales of his western lands. The latter effected a sale by making representations as to the quality and location of the land, which proved to be grossly untrue. The principal, who received and retained the price, was prosecuted by the vendee for the fraud, and he insisted, by way of defence, that though he authorized his agent to negotiate the sale, he did not instruct him to cheat the purchaser; that the statements ought not to be imputed to him, for he did not make them personally, and that they could not be deemed fraudulent, for, when they were made, neither he nor the agent knew whether they were true or false. The Court held, that the principal could not claim immunity on the ground that the fraud was perpetrated through the instrumentality of his agent, and that a material misstatement, made by one who neither knows nor believes it to be true, is just as much a fraud on the party with whom he deals as if he knew it to be false.

In Condit *v.* Baldwin, the doctrine of involuntary ratification was sought to be extended to a case where the element of fraud was wanting, and where the principal, without knowledge of the facts, had received the fruits of a transaction in which the special agent had exceeded the limits of his actual and apparent authority. The Court held that, under such circumstances, the application of the rule recognized in the case of Bennett *v.* Judson would be inappropriate and unwarranted. The question arose

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on a defence of usury. The Plaintiff had intrusted money to a special agent for investment. The latter lent it in the name of his principal, but transcended his power by contracting with the borrower for the payment of a bonus on the amount. The Plaintiff, in ignorance of this, received the security taken for the loan, and was met, in an action afterward brought to enforce it, with the defence that, by accepting it, she had adopted the unknown and unauthorized act of the agent. The opinion of the Court was delivered by the present Chief Judge, who aptly illustrated the distinction to which we have alluded, by a reference to the leading cases of Wilson *v.* Tumman and Bush *v.* Buckingham. "Where a landlord authorized a bailiff to distrain for rent due from his tenant, directing him not to take anything except on the demised premises, and the bailiff distrained cattle of another, supposing them to be the tenant's, beyond the boundary of the farm, and the cattle thus taken were sold, *and the landlord received the proceeds*, the landlord was held not to be liable in trover for the value of the cattle, unless it was found that he ratified the act of the bailiff with knowledge of the irregularity, or chose without inquiry to take the risk upon himself and to adopt the whole act; and it was also held that *by adopting and ratifying what he had authorized, he did not adopt and ratify the unauthorized acts of his agent.*" In Bush *v.* Buckingham (2 Vent. 83), the Plaintiff made a loan of fifty pounds at a legal rate of interest. She referred the borrower to her scrivener, who would draw the bond to secure the loan; and the scrivener, in error and against her will, included therein more than lawful interest. In a suit on the bond, the Defendant interposed the defence of usury, but it was overruled, as there was no intent on her part to take or receive more than lawful interest; and it was held that by commencing suit on the bond she did not ratify the act of her agent in providing for the payment of more than legal interest, but that she might recover the amount loaned, with lawful interest (21 N. Y. 225, 226).

The doctrine of the case of Bennett *v.* Judson, in its legitimate application to frauds perpetrated through an agent, acting within

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the scope of his power, was afterward reaffirmed in Elwell v. Chamberlain (32 N. Y. 611). The rule announced in Condit v. Baldwin has since been recognized as that appropriate to a case where the question arises on the authority of the agent to enter into a collateral contract in behalf of his principal (Bell v. Day, 32 N. Y. 165, 178). There is no antagonism between the two classes of cases, and the distinction between the subjects to which they are respectively applicable, and the principles on which they rest, is overlooked by those who suppose these decisions to be inharmonious.

In the case before us it is claimed that the receipt by the testator of the proceeds of an authorized sale, is to be deemed an adoption of a contract made without his authority, and to which he never knowingly assented. Such a ruling would be subversive of well-settled legal principles, and would open the door to illimitable frauds by brokers, factors, attorneys, and others clothed with limited powers and occupying strictly fiduciary relations (Owings v. Hull, 9 Peters, 608, 629; Bell v. Cunningham, 3 id. 69, 76, 81; Brady v. Todd, 99 Eng. Com. Law, 591, 601, 605; Freeman v. Rosher, 66 id. 787; Seymour v. Wyckoff, 10 N. Y. 213). In the language of Judge Story, in the first of these cases, "no doctrine is better settled, both upon principle and authority, than this: that the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all the material facts."

The Plaintiff is chargeable with notice of the extent and limits of the power of the special agent from whom he purchased (Nixon v. Palmer, 4 Seld. 398; Sage v. Sherman, Lalor's Supp. 147, 152; Beals v. Allen, 18 Johns. 363, 366). He knew that Hollister was not the owner of the stock he assumed to sell, and he was content to take a warranty from one who had neither actual nor apparent authority to bind his principal by such an engagement. It was a single and isolated transaction, unaided by any extrinsic fact or any antecedent relation, and upon its own merits it must stand or fall. The sole authority of Hollister was to sell the stock at par, with interest from the date of the

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last dividend, and to insert the name of the purchaser in the blank left in the body of the transfer written and signed by Mr. Tracy. The representations to the Plaintiff were not even made in the testator's name, and the purchaser, who assumed the risk of bargaining without inquiry, cannot transfer to the Defendant a loss resulting from his own neglect and incaution.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All the Judges concurring, except GROVER, J., who did not vote,

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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THE PEOPLE EX REL. ANDREW McMULLEN, MAYOR OF SCHENECTADY, APPELLANTS, v. WM. S. SHEPARD, THOMAS COLEMAN, STEVENS V. TRULL, GEORGE W. LUTHER, AND NELSON DAVENPORT, RESPONDENTS.

Capital Police District—Constitutionality of Statute.

The law of 1865, establishing a Capital Police District, embracing portions of the counties of Albany and Rensselaer, is in conflict with no provision of the State Constitution.

The Amendatory Act of 1866, extending that district so as to include within its bounds a portion of the county of Schenectady, is also free from constitutional objection.

In a public statute, applicable to particular localities or to known and open highways, there is ordinarily no occasion for the minuteness and precision of description usual in conveyances of real estate.

The validity of general laws, enacted by the constituted authorities of the State, cannot be challenged in the courts on the theory that they may have been adopted from motives in hostility to the public good.

APPEAL from the Supreme Court. The action was in the nature of a quo warranto, to test the constitutionality of the amendment to the Capital Police Act of 1865, by the Act of 1866, which provided for including the city of Schenectady within the district, together with four miles of intermediate territory within the lines of the New York Central Railroad.

The cause was tried at the Albany Circuit, before Mr. Justice Hogeboom, who gave judgment for the Defendants. The judgment was unanimously affirmed by the Judges of the Third Judicial District, and the Plaintiffs appealed to this Court. The facts are sufficiently stated in the opinion.

Alonzo C. Paige for the Appellants.
John H. Reynolds for the Respondents.

PORTER, J.—Most of the questions raised on the present appeal were disposed of ten years since, in the case of The People on the relation of Fernando Wood v. The Metropolitan Police Commissioners (15 N. Y. 532). They were discussed on that occasion

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with memorable ability, as well in the forensic arguments as in the opinions delivered by the Court; and the result was an exposition of the Constitution in this regard, by which every citizen is bound.

Certain propositions are deducible from that decision, which essentially narrow the range of the present discussion.

1. It is within the constitutional authority of the legislature to establish new civil divisions of the State, embracing in the districts so created several towns, cities, or counties, or such portions thereof as may be deemed appropriate for the general purposes of civil administration.

2. The organization, for police purposes, of districts not coterminous with others recognized by the Constitution, is not incon, sistent with the continuance of such antecedent civil divisions, for every general purpose prescribed in the organic law.

3. The police powers exercised in the towns, cities, and counties, respectively, were vested in the local authorities by legislation, and not by irrevocable constitutional grant.

4. The legislature has authority to arrange the distribution of these powers as the public exigencies may require, apportioning them to local jurisdictions to such extent as the law-making power deems appropriate, and committing the exercise of the residue to officers appointed as it may see fit to ordain.

5. This is a continuing legislative power, in virtue of which, from time to time as occasion may require, jurisdiction committed to the towns, cities, or counties, may be resumed and vested in other authorities appointed by the State government.

6. "The State," in the language of the distinguished jurist by whom in that case the leading opinion was delivered, "has an interest in the repression of disorder, and the maintenance of peace and security in every locality within its limits; and if, from exceptional causes, the public good requires that legislation, either permanent or temporary, be directed toward any particular locality, whether consisting of one county or several counties, it is within the discretion of the legislature to apply such legislation as in its judgment the exigency of the case may require;

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and it is the sole judge of the existence of such causes" (15 N. Y. 544; 32 id. 377).

The Capital Police Act now under consideration was adopted by the legislature in the exercise of this constitutional authority. In the form in which it was originally enacted, its validity is too clear for serious discussion. The substantial issue is as to the constitutionality of the act as amended in 1866. In considering this question, the amendments should be treated as incorporated in the body of the original law (Sess. Laws, 1865, ch. 554; id. 1866, ch. 483).

The Act of 1865 included in the district to which its general provisions are applicable certain portions of the counties of Albany and Rensselaer, consisting of contiguous territory, and embracing within its bounds the cities of Albany and Troy, and various towns and villages, including Greenbush, West Troy, Green Island, Cohoes, and Lansingburg. The amendment of 1866 extended the district by the addition, in the county of Schenectady, of "all that territory covered by and included within the lines of the property of the New York Central Railroad, between the cities of Albany and Schenectady, and the city of Schenectady." The entire area within the limits designated by the two acts is declared to be "constituted and territorially united, for the purpose of police government and discipline therein," into one district, which shall be known as the Capital Police District of the State of New York.

It is claimed that the district thus created does not consist of contiguous territory, and that this constitutes a fatal objection to the validity of the act. It is unnecessary to determine whether this proposition, if well founded in fact, would be tenable in law. Certainly there is no such specific limitation in the Constitution of the powers to be exercised by the legislature in the organization of districts for police purposes; and "we are unable to see," as this Court said in the Metropolitan Police case, "that any arrangement of the machinery of the government which the Constitution has provided, would be impeded or disturbed" by an act incorporating two neighboring cities in such a district

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without embracing an intervening town. Deviations from the ordinary system of police regulation ought not to be made, except when demanded by public considerations; and it would be the part of wise legislation to limit them, as far as practicable, by the extent of the particular evils they are designed to abate. But in the present instance the district created by the act consists only of contiguous territory. Its exterior bounds are fixed and definite. All within these bounds is embraced; all without is excluded. The territory thus embraced is none the less contiguous, whether its width be thirty yards or thirty miles. The power of the legislature, if it were subject to the supposed limitation, must be determined with reference to the simple fact of actual contiguity (Holmes *v.* Carley, 31 N. Y. 289).

It is claimed that, in including the New York Central roadway within the limits of the district, the Senate and Assembly acted in bad faith, and with the evasive and fraudulent purpose of making the entire territorial area contiguous, in accordance with the supposed requirements of the Constitution. It is not easy to perceive how the validity of a law can be questioned on the ground that the legislature complied with the provisions of the Constitution only because they were forbidden to do otherwise. If it were decorous for us to institute an inquiry into the motives of official action by a co-ordinate branch of the government, there is not a scintilla of evidence to justify us in imputing to the legislature any purpose of fraud or evasion. It is impossible to read the provisions of the act without being impressed with the importance of the ends it seeks to attain, and the efficiency of the agencies it organizes for the preservation of order, the protection of person and property, the detection and arrest of culprits, and the punishment and prevention of crime.

The district comprises the State capital, with the neighboring cities and villages, and the depots of general commerce at one of the great central points where the avenues of travel and traffic converge. It includes the termini of the various routes of river, canal, and railway transportation which centre in the vicinity of the capital, and it embraces a limited area which offers peculiar

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temptations to rogues, and unusual facilities for confederacy, concealment, and flight. It is true that there are no habitations on the four miles of roadway between Schenectady and Watervliet; but there was obvious propriety in the provision embracing it within the bounds of the district. In framing a law for the purpose of extending special protection to the persons and property of citizens, strangers, and travellers, in a locality of peculiar exposure, the legislature were not bound to ignore the fact, officially communicated to them in the report of the State engineer and surveyor, that over the thoroughfare whose eastern terminus it was proposed to protect there is an annual transportation of between three and four millions of passengers, and of property to the amount of a million and a half of tons (Assembly Documents, 1865, No. 176, pp. 48, 50). They did not need to be admonished, by the then recent case of Gordon, that this was a convenient avenue of escape for the incendiary, the thief, and the burglar, as well as the midnight murderer. They could not be unmindful of the importance of police surveillance on a portion of the route especially infested by those who pursue their work of pillaging travellers by night and by day; nor could they be insensible of the advantage of a police force properly distributed, subject to common control, and aided by facilities for rapid communication from city to city, by telegraphic and railroad lines. So much of the intermediate territory between Watervliet and Schenectady as the legislature deemed necessary for these purposes, was accordingly included within the police district; and it constitutes no objection to the validity of the law, that it was not thought needful to include the residue of Rotterdam, an orderly and rural town, which offered no temptation to rogues and criminals, and needed no special police for the protection of its sparse population.

It is proper, however, to add, that we do not recognize the right of the relator to assail the validity of the act on the theory that it was adopted from motives in hostility to the public good, or to the general policy of the State. In the language of Judge Denio, "the courts cannot impute to the legislature any other

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than public motives for their acts. If a given act of legislation is not forbidden by express words, or by necessary implication, the Judges cannot listen to a suggestion that the professed motives for passing it are not the real ones. If the act can be upheld upon any views of necessity or public expediency, which the legislature may have entertained, the law cannot be challenged in the courts" (15 N. Y. 545). It follows from these views, that on the principal questions, so ably discussed by the learned counsel for the Appellants, we concur in the judgment of the Court below.

We think there is no force in the suggestion that the law is invalid for uncertainty, in the description of that portion of the territory included within the lines of the New York Central Railroad. There is no occasion, in a statute of this nature, for the minuteness of description usual in conveyances of real estate. The area embraced in the district is defined with sufficient certainty for all the purposes of the act. The Central Railroad, between the cities of Albany and Schenectady, is a known and open highway of commerce, of which the course and limits are marked with more precision and permanence than ordinarily define the bounds of private possession; and, when it is the subject of legislation, there is no more occasion for a special designation of its metes and bounds, than if the subject of the statute were the Delaware and Hudson Canal, the New York Central Park, or the Suspension Bridge at Niagara.

The Judge properly overruled the objection taken on the trial, that the notice of the organization of the board of police, required by the 55th section of the act, was not served on the relator until after the commencement of this suit. The service of the notice was not to precede, but to follow, the Defendants' organization as a police board for the district, as enlarged by the law of 1866. It was not a condition precedent to the assumption of office by the Defendants, but a duty imposed in virtue of such office. The purpose of the notice was to advise the old police of the termination of their authority, and no time was prescribed for its service. It was in fact served, before this action

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was brought, on all the members of the old police force of the city of Schenectady, except the mayor and one of the deputy sheriffs; and the only effect of the delay as to them was, not to divest the Defendants of their offices, but to leave the relator and the deputy for the time being in the discharge of their duties under the old law. It is unnecessary to determine the question, whether their official authority as police officers was terminated by actual notice, in another form, of the organization of the new board, as that is an immaterial issue which does not concern the Defendants. The action was brought under the first subdivision of the four hundred and thirty-second section of the Code; and the gravamen of the issue is, as to their title to the offices they assume to hold. It does not appear from the finding of facts, that the omission to serve the notices at an earlier day was imputable to negligence; but even if there had been a culpable and unreasonable delay, it would have been unavailing, in this action, to the relator. The remedy, if any, would be by proceeding under the second subdivision of the section, and alleging that the Defendants were in office, and that they had forfeited it by breach of official duty.

All the Judges concurring, except GROVER, J., who was for reversal,

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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CHARLES O. SHEPARD, EXECUTOR OF JOSEPH JOHNSON, v. HORACE S. PARKER AND HUGH STEELE.

Evidence—Impeachment—Admissions.

That a married woman should hang out signals to a man for clandestine meetings, is an impeachment of her general character.

Upon a trial where the question is whether a certain note was given in compromise of a charge of rape, and the person upon whom the offence was alleged to have been committed gives testimony tending to show that it was given in settlement of civil damages only, it is competent to ask her if she did not admit, on the trial of the indictment against Austin for the alleged rape, that she wrote him a letter, in which she admitted that she hung out signals on a cherry-tree to induce him to come to her house. Such acts are proper for the consideration of a jury in estimating the character of the witness.

THIS is an action upon a promissory note for $100, dated August 14, 1861, given to Polly Plucker or bearer, payable six months after date. The defence to the note was upon the ground that it was given in settlement of a criminal prosecution, to wit, of a rape. The claim upon the other side was, that the note was given in settlement of the private damages only. The jury found in favor of the Defendants. The General Term of the Eighth District reversed the judgment, on the ground of the admission of illegal evidence. The Defendants appeal from that judgment to this Court, stipulating that judgment absolute may be entered against them if the said order of reversal be affirmed.

H. L. Comstock for the Appellants.

L. Spring for the Respondent.

HUNT, J.—The Court below disregarded the objections of the Plaintiff, except in a single particular. Concurring in its opinion in regard to the other points, I will examine the question upon which a new trial was ordered.

The question of fact before the jury was, whether the note in suit was given in settlement and compromise of the charge of a rape, alleged to have been committed by one Austin upon the person of Mrs. Plucker. The evidence of the Defendants was

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closed, and Mrs. Plucker was called by the Plaintiff, and gave evidence tending to show that the note was not given in settlement of the criminal offence. Upon cross-examination, she was asked if she had not frequently written letters to Austin, the alleged offender. This was objected to as immaterial, the objection overruled, and she answered that she had not. The Defendants' counsel then asked her if she did not admit, on the trial of the indictment against Austin for the alleged rape, that she wrote him a letter, in which she admitted that she hung out signals in a cherry-tree to induce him to come to her house. Upon the objection being made that this evidence was immaterial, the Court decided that the same could only be received for the purpose of impeaching the witness. The counsel then further objected that the witness could not be impeached by proving specific acts, and, secondly, that the evidence offered would be no impeachment of the general character of the witness. The Court overruled the objection. The counsel excepted, and the witness answered that she partially admitted it; she did not then understand it.

This evidence was competent for the purpose of impeaching the witness. It is the constant practice at the Circuit to inquire of a witness if he has not been guilty of a specific offence, for the purpose of impeaching him. It is usually a satisfactory test. If a man admits himself to have been guilty of heinous offences, the jury would justly give him less credit than if his life had been pure and his conduct upright. If a female witness admits herself to have broken down those barriers which the virtue and religion of every civilized country have reared for her improvement and protection, her oath would be of little value before a jury of intelligent men. This practice is uniform, and fully sustained by the authorities (G. W. Turnpike Co. *v.* Loomis, 32 N. Y. 127; The People *v.* Le Beau, 36 id. 223).

The protection against its abuse is twofold: first, in the privilege of the witness to refuse to answer, and, second, in the discretion of the Judge. In the present case the witness was placed in a position where her own character was necessarily involved. She had testified on the trial of Austin for the alleged offence of

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a rape upon her person. We may assume that her testimony tended to sustain the charge, as a prosecution could not well be carried on without it. For the purpose of impairing the effect of her testimony, she was inquired of if she had not admitted that she had made signals to him upon the cherry-tree to induce him to come to her house. She admitted that she had. Her testimony and its weight upon a contested question were now again before the jury, and the point was made, that, being a married woman, making a charge against Austin of having ravished her person, she could not deny that she had made him these clandestine communications. I think it was a depreciation of her character that might justly have been considered by the jury. She did not claim her privilege. The Judge did not think it necessary to interfere, but in his discretion deemed the question proper. An examination of the first case I have cited will show numerous instances where the Judge, in his discretion, has admitted the degrading evidence, and the decision has been sustained on appeal.

I think the judgment of the General Term, ordering a new trial, should be reversed, and the judgment of the Circuit affirmed.

Affirmed.

WRIGHT, GROVER, and SCRUGHAM, JJ., not voting.

JOEL TIFFANY,
State Reporter.

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——— *Misnomer, no Ground of—Injury—Loss of Service, by whom recoverable.*] Under the Code of Procedure, the only way to take advantage of a misnomer is by answer. Where the answer omits to set up such misnomer, no advantage can be taken of it on trial.

A mere misnomer is only a formal error, and is amendable in the Court of original jurisdiction, and not entitled to notice in this Court.

Where a child under age is injured, etc., the parent may recover for loss of service until the child attains the age of twenty-one years; and if the injury continue beyond the period of legal majority, the child may recover for such further loss.

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ASSESSORS, *protected like all Judicial Officers.*] It being the duty of assessors to ascertain and determine all taxable property, real or personal, within their town or ward, subject to taxation, they have jurisdiction to make the necessary investigation in respect to all property, and they are not liable for any errors they may commit in thus exercising the duties of their office. Their office, in this respect, is judicial, and in the discharge of its duties they are within the rule of protection extended to all judicial officers.

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——— PREFERENTIAL—*Possession unchanged—Presumptive of Fraud.*] In this State preferential assignments are not for that reason void, and an assignment authorizing the assignee to employ and pay all necessary attorneys' and clerks' fees, etc., and to take and have a reasonable compensation for his services; also, to pay and discharge all reasonable costs, etc., is not thereby rendered void, because it authorizes no more than was before lawful for the assignee to do.

The fact that there is no change of possession of the assigned property, in case of assignment for benefit of creditors, is not conclusive of fraud, but only presumptive thereof.

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A creditor who has in no manner succeeded to the rights of one

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of the partners, who has become the assignee of the effects of the firm, cannot assert such assignee's rights to redress against those who may be indebted to the firm.
BEARDSLEY SCYTHE CO. *v.* FOSTER 215

ATTORNEY—*Power of Supreme Court to strike from Rolls.*] The Supreme Court of this State has power, under the statute, to strike from the rolls the name of an attorney for general misconduct in the practice of his profession, after having caused a copy of the charges preferred against him to be served upon him, and opportunity to be heard in his defence.
The proper mode of proceeding in such case, is by the service of an order upon the attorney, to show cause why he should not be stricken from the rolls, etc.
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portions of the counties of Albany and Rensselaer, is in conflict with no provision of the State Constitution.

The Amendatory Act of 1866, extending that district so as to include within its bounds a portion of the county of Schenectady, is also free from constitutional objection.

In a public statute, applicable to particular localities or to known and open highways, there is ordinarily no occasion for the minuteness and precision of description usual in conveyances of real estate.

The validity of general laws, enacted by the constituted authorities of the State, cannot be challenged in the courts on the theory that they may have been adopted from motives in hostility to the public good.

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CHARTER OF THE CITY OF NEW YORK—*Corporation may employ additional Counsel.*] The provision in the amended Charter of the City of New York, imposing on the Law Department the duty of conducting all the law business of the Corporation, was not intended to disable the City from prosecuting or defending suits without the consent of the Corporation Counsel; or to deprive it of the ordinary right of suitors to employ additional counsel when it deemed it necessary to do so.

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CHURCH ORGANIZED UNDER GENERAL LAW CAN MAINTAIN EJECTMENT—The Methodist Episcopal Church of Fort Edward, organized under the General Law, in 1828, and in accordance with the discipline of said church, became a legal corporation, and as such acquired the legal title to lands conveyed to them for the purpose of erecting a house of worship thereon, and as such corporation can maintain ejectment against those who wrongfully enter upon and detain from it said premises.

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COMPANY, INSOLVENT, DIVIDES ITS CAPITAL—*Recovery from Stockholders.*] Where an insurance company, organized under the general law applicable to such companies, being insolvent, distributes its capital among its stockholders, thus placing it beyond the reach of its creditors, it acts in fraud of its creditors, and such fund may be recovered back from those who received it, by a proper action commenced by the proper parties. The complaint in such case need not aver that in making such distribution it was done with an intent to defraud the creditors.

But no one creditor can individually maintain an action against an individual stockholder for the share so illegally distributed to him; the liability is to the creditors generally, and the action should be commenced by some party representing all the creditors.
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——————— STATUTE—*Penalties for Encroachment on Highway.*] The statute imposing penalties for encroachments upon highways applies only to cases where the highway has been regularly laid out according to law, and not to cases where the right of way is by prescription.
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CONTRACT—CONDEMNED—*No Notice to Contractor.*] Where, by the term of a contract, cement is to be delivered to the Defendant at a place, to be taken on board of Defendant's vessel, and to be transported to a distant port, where it is to be of a quality to pass inspection of the proper officials, and the cement thus received

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is to be paid for in thirty days after delivery on board of the vessel, and payment to be received by approved paper, the title to the cement passes on delivery to the vessel, and the Plaintiff becomes liable to make good every term and condition of his contract. If the cement, or any part of it, is not of a quality to pass inspection at the designated port, and is condemned by the inspecting officer, it becomes the duty of the Defendant to either return such condemned article to the Plaintiff, or to notify him where the same is stored, subject to his order; and, failing to do so, he cannot recover by way of counterclaim for such damaged or condemned cement.

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2. CONTRACT—*Discovery of Fraud—Time of Disaffirmance.*] It is the duty of a party who proposes to disaffirm as fraudulent a contract entered into by himself, partner, or agent, to do it at once, upon discovery of the fraud.

If, after discovering the fraud by which he was induced to enter into the contract, he remain silent or inactive, and give no intimation of a purpose to disaffirm until he finds the contract likely to prove unprofitable, he will then be estopped from disaffirmance.

One of the partners of a firm, in the absence of his partner, was, by false representations, induced to endorse a note in the name of the firm. On the return of the partner, the fraudulent representations were discovered, and the partners were dissatisfied with the party procuring the endorsement, but they gave no notice of disaffirmance for the period of three months, and further availed themselves of the benefits of such endorsement: Held, the firm was bound thereby.

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3. ——————*Written, cannot be varied by Parol Evidence.*] A written agreement between parties must be regarded as containing the whole of their agreement upon the subject-matter thereof, and as merging therein all prior and contemporaneous understandings. Therefore, evidence offering to establish other facts and conditions as part of the contract, which are not contained in the agreement, is inadmissible.

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—————— *Costs in Discretion of Court awarding them—Appeal—Conflict of Evidence.*] In suits in equity, the giving or withholding of costs is in the discretion of the Court, which discretion, except in cases of abuse, the Appellate Court will not attempt to control.

Where there is conflicting evidence upon a material fact before the court, referee, or jury, the finding thereon is conclusive, and cannot be questioned by this Court.

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EVIDENCE, CONFLICTING — *Nonsuit refused — Delivery without Authority of Owner.*] Where the case presented only questions of fact, in respect to which there was conflicting evidence, the Court properly refused to nonsuit the Plaintiff. The case was properly submitted to the jury.
Where a person, in possession of goods which belong to another, and which, in law, he is bound to deliver on demand, delivers them to a third party, without authority from the owner, he is responsible for a refusal of such holder to deliver them to the owner thereof.
DUNHAM *v.* TROY UNION RAILROAD CO. 67
———Appeal—Equity—Costs in Discretion of Court awarding them 86
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———Credibility—Slander—Words must impute Indictable Crime 134
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———Equitable Lien—Admissions of Agent . . . 270
See MARRIED WOMAN.
2. ———IMPEACHMENT—ADMISSIONS—That a married woman should hang out signals to a man for clandestine meetings, is an impeachment of her general character.
Upon a trial where the question is whether a certain note was given in compromise of a charge of rape, and the person upon whom the offence was alleged to have been committed gives testimony tending to show that it was given in settlement of civil damages only, it is competent to ask her if she did not admit, on the trial of the indictment against Austin for the alleged rape, that she wrote him a letter, in which she admitted that she hung out signals on a cherry-tree to induce him to come to her house. Such acts are proper for the consideration of a jury in estimating the character of the witness.
SHEPARD *v.* PARKER 361
3. ——— OF PROVOCATION *to Murder, admissible when.*] Where the intent of the prisoner, who is charged with the crime of murder, remains to be proved, it is competent for the prisoner to prove that he acted upon immediate provocation, and to show what that provocation was.
PEOPLE *v.* LEWIS.

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———— Statute of Frauds—Performance of void Contract Obligation 250
See STATUTE OF FRAUDS. 2.

4. ———— *Written Contract—Parol.*] When the case shows that the findings of the referee are based upon testimony which was clearly illegal, the party in whose favor such illegal findings were made cannot avail himself of them to sustain his judgment.
HATCH *v.* PRYOR 317

EXECUTORS CAN *enforce Bond to pay Mortgage on Testator's Real Estate.*] Where a party has, for a good and sufficient consideration, given his bond to executors, that certain parties who are legally bound to do so shall pay and discharge a mortgage upon the real estate of their testator, he cannot, on breach of the condition of his bond and suit commenced thereon, object to the capacity of such executors to sue on such bond.
The form of the judgment against such obligee should be, that he pay and cause to be cancelled of record, the mortgage, within a time specified, and in default, that he pay the amount due, etc.
FARNHAM *v.* MALLERY 171

———— Trustee—Will—Power to sell Real Estate . . 184
See WILL. 1.

EXPECTANCY—Heir-at-Law—Transfer 290
See PARTITION.

EXPLOSION—Loss by Fire occasioned by—Steam-engine—Insurance 180
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FALSE IMPRISONMENT—*Corporation Ordinance—Powers of Metropolitan Police Board.*] When the Defendant justifies the keeping in custody the Plaintiff from evening until the morning, under that rule of the Metropolitan Police Board which authorizes the detaining of persons charged with the commission of felonies and misdemeanors, he must show that the alleged accusation was such as is denominated a felony or misdemeanor by law. The accusation that he had violated an ordinance of the Common Council of the city of Brooklyn is not sufficient.
SCHNEIDER *v.* LANE. 266

FIRE OCCASIONED BY EXPLOSION, Loss by—Steam-engine Insurance 180
See INSURANCE. 4.

FORECLOSURE—*Judgment—Purchaser—Jurisdiction.*] One who purchases under a judgment of foreclosure, thereby submits himself to the jurisdiction of the Court; and he may be compelled, on motion, to comply with the conditions of sale.
When the purchaser is in possession, under a decree which has not been fully executed, mere lapse of time is no answer to a motion to compel the payment of the amount of his bid.
When a motion is made, by those having an interest in the fund, that the money be paid into Court, it constitutes no valid objec-

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tion that one of the original parties is dead, and that the action has not since been revived.
CAZET *v.* HUBBELL 333

FRAUD, DISCOVERY OF—Contract—Time of Disaffirmance . 82
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GOOD AND SUFFICIENT DEED—Words—Construction—Real Estate 211
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GRANTEE OF LAND Purchasing with Knowledge of Prior Conveyance—Deed not Recorded 46
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HOLDER, BONA FIDE, Rights of Assignee of—Negotiable Paper . 66
See NEGOTIABLE PAPER.

HUSBAND AND WIFE—*Agency of Husband.*] Where property is bought by the husband as the agent of the wife, and afterwards sold by him, as such agent, at a profit, the profits belong to the wife. There is nothing in the policy of the law as it now exists which makes the agency of the husband, acting for the wife, differ from the like agency of any other party.
MERCHANT *v.* BRUNNELL 35

——— Possession of Real Estate by, under Wife, not adverse—Damages—Interest 57
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INDICTABLE CRIME, Words must Impute—Slander—Evidence—Credibility 134
See SLANDER.

INFRINGEMENT OF TRADE MARK, what—Injunction . . 167
See TRADE MARK.

INJUNCTION—*Tax illegally assessed—Remedy what. Code*, § 11.] An application for a preliminary injunction is addressed to the discretion of the Court; and although the Appellate Court may require the discretion to be exercised, it will not assume to control such discretion.

An order refusing to grant such injunction does not come within subdiv. 2 of § 11 of the Code of Procedure, and is not appealable to this Court.

It seems that an injunction cannot legally be granted to restrain the collection of a tax, although illegally assessed; the proper remedy is by action for damages, etc.

HASBROUCK *v.* KINGSTON BOARD OF EDUCATION 106

INJURY—LOSS OF SERVICE, by whom Recoverable—Misnomer no Ground of Appeal 203
See APPEAL.

INNOCENT PERSONS—*Loss by Third Party—Which shall sustain?*] Whenever one of two innocent persons must suffer by the acts of a third party, he who has enabled such third party to occasion the loss must sustain it. When a party sells a cargo of corn and allows the purchaser to take the corn, ship it, receive a bill of lading therefor, and draw upon his consignee with bill of lading attached to the draft, such vendor will not be allowed the right of stoppage in transitu to obtain payment, when by so doing the consignee is to suffer for his acceptance and payment of such draft.

RAWLS *v.* DESHLER 91

INSOLVENT COMPANY divides its Capital—Recovery from Stockholders 124
See COMPANY.

INSURANCE—Agency—*Estoppel.*] Where an insurance company employs an agent to solicit the insurance of property in their company, and furnishes blanks to be filled by the statement of the insured, and the agent of the company takes the responsibility of filling up these blanks, and assures the applicant that all is right, the company will not be permitted to prove the facts to be different from those stated by the agent in the application.

ROWLEY *v.* EMPIRE INS. CO. 285

2. ——————Carrier's *Insurable Interest—Negligence must cause Damage.*] A common carrier has an insurable interest in goods being transported by him to the extent of advances made, freight, and his legal obligations to the owner of the cargo, which is the fair value of the property carried by the contract of indemnity.

Although the Plaintiff was guilty of negligence, it will furnish no defence unless such negligence contributed to the loss and damage complained of.

Where the damage consisted in the sinking of a boat loaded with

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grain and the injury to the grain, the extent of the damage involves the price of the grain at the place of the disaster.
SAVAGE *v.* CORN EXCHANGE FIRE AND INLAND INS. CO. . . 112

3. INSURANCE—*Condition—Construction.*] When a policy of insurance is upon a building and a stock of goods, etc., such as is usually kept in country stores, it covers all articles of merchandise coming within such description, even though it include articles generally prohibited except at special rates.
PINDAR *v.* KINGS CO. INS. CO. 330

4. ———— *Loss by Fire occasioned by Explosion—Steam-engine.*] In a policy of insurance upon a building in which there is a steam-engine, a clause exempting the company from liability, when the loss by fire is occasioned by any explosion, must be construed as applicable to an explosion of the engine within the building, as well as to the explosions of any kind without the building; and the fact that an extra premium was paid on account of the increased risk from the engine within the building does not change the construction.
HAYWARD *v.* LIVERPOOL FIRE AND LIFE INS. CO. . . 180

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———— CARRIER'S INSURABLE—Negligence must cause damage 112
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JUDGMENT—Foreclosure—Purchaser—Jurisdiction . . 333
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2. ————*of de facto Judge cannot be collaterally impeached.*] It is sufficient to sustain a judgment that the Judge presiding at the trial and judgment was a de facto judge at the time. His judicial acts, so far as they affect third parties, cannot be collaterally impeached.
READ *v.* CITY OF BUFFALO 79

3. ————*Power to reform — Pleading — Mistaken Averment — Variance.*] A party is not estopped by a mistaken averment of the law in his pleadings. But the Court will give such relief as he appears to be entitled to, notwithstanding such mistaken averment.
Where the opposite party has not been misled by such mistake, the party making the averment will not be precluded from asking such relief as the Court, upon a view of the case, shall deem him to be entitled to.
UNION BANK *v.* BUSH 235

JUDICIAL OFFICERS, Assessors protected like all . . . 196
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LEASE—ASSIGNMENT—Pleading—Equitable Relief Trial . . 226
See PLEADING. 2.

LEGACY, WHAT CONSTITUTES—*Dower—Proportional Deductions.*] Every bequest of personal property is a legacy, including as well those made in lieu of dower, or in satisfaction of an indebtedness, as those which are wholly gratuitous.

Where the testator provides in his will that, in case his estate should not be sufficient to pay the legacies, the deficit is to be deducted in proportion to the sums given to each, he makes the amount given to the widow in lieu of dower to depend upon the sufficiency of the estate to pay the legacies given. The same principle applies also where the legacies are to be increased by a surplus in the estate.

ORTON *v.* ORTON 18

LIABILITY UPON AGREEMENT TO PAY THIRD PARTY—*Power of Referee to allow Amendment. Code,* §§ 272, 173.] Where a person receives money upon an agreement to pay the demands of a third party against those from whom he received the money, he is liable, upon such promise, to pay the same to the party entitled, irrespective of the legal obligations of the party paying the same.

SECOR *v.* LAW 328

LIEN, EQUITABLE—Evidence—Admissions of Agent . . 270
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MAKER OR ENDORSER of Accommodation Note, Authority of Partner to become—Notice. Code, §§ 136, 274 . . . 218
See NOTE.

MARRIED WOMAN—*Equitable lien—Evidence—Admissions of Agent.*] Under the laws of the State, conferring upon married women the rights and powers of femes-sole in respect to their separate estate, they are liable to fulfil their contracts in the management of such separate interests.

A married woman employing an attorney in relation to her separate interest, is liable to pay the usual fees, the same as other parties.

OWEN *v.* CAWLEY 270

METROPOLITAN POLICE BOARD, Powers of—False Imprisonment—Corporation Ordinance 266
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See JUDGMENT. 3.

MORTGAGE ON TESTATOR'S REAL ESTATE, Executor can enforce Bond to pay 171
See EXECUTOR.

MORTGAGE—*Satisfaction.*] Where a note is given as a part payment of mortgage, the mortgagees cannot be compelled to cancel the mortgage until the note is paid.
RANGER *v.* GOODRICH 303

——— TITLE to Real Estate—Lapse of Time—Presumption repelled 24
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NEGLIGENCE MUST CAUSE DAMAGE—Carrier's Insurable Interest 112
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——— Railroad—Nonsuit—Presumptions for Plaintiff . 8
See NONSUIT.

NEGOTIABLE PAPER—*Rights of Assignee of bonâ fide holder.*] An assignee of a promissory note, acquiring title after the maturity of note from a *bonâ fide holder* for value, takes all the rights of such bonâ fide holder.
BENEDICT *v.* DE GROOT 66

NEW YORK, CHARTER OF THE CITY OF—Corporation may employ additional Counsel—Corporation Counsel . . . 206
See CHARTER.

NEW YORK COUNTY, BOUNDARY—*Riot Act—Laws* 1855.] The boundary of territorial jurisdiction between the counties of New York and Kings is the actual line of low water on the Brooklyn side of East River.
ATLANTIC DOCK COMPANY *v.* CITY OF BROOKLYN . . 305

2. ——— OF,—*Boundary—Jurisdiction.*] The waters of the Atlantic Basin, on the Brooklyn side of East River, are within the county of New York, and the city of Brooklyn is not liable for the destruction by a mob of a floating elevator within such basin.
ORR *v.* CITY OF BROOKLYN 278

NO NOTICE TO CONTRACTOR—Article Condemned . . 49
See CONTRACT.

NONSUIT—*Presumptions for Plaintiff—Negligence—Railroad.*] On a question of nonsuit, all disputed questions of fact are to be decided in favor of the Plaintiff; and all presumptions and influences which he had a right to ask from the jury, are to be conceded to him.

In the management of a railroad and machinery, the railroad corporation is bound to use the utmost care and vigilance to avoid the dangers attending a collision.

The party injured was required to exercise only the ordinary

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prudence and attention which sensible men are accustomed to give under similar circumstances.
Cook *v.* New York Central R. R. Co. 8

NONSUIT REFUSED — Conflicting Evidence — Delivery without Authority of Owner 67
See Evidence. 1.

NOTE, ACCOMMODATION —*Authority of Partner to make or endorse —Notice. Code*, §§ 136, 274.] As it is no part of the business of a mercantile firm to make or endorse notes for third persons, there is no implied authority for an individual member of such firm to make or endorse such paper in the firm name. Consequently the holder of such paper, with notice that it was made or endorsed for the purpose of accommodation merely, without the consent of the firm, cannot recover upon it.
Where the maker of a note, endorsed by a firm, presents the same to be discounted for his accommodation, such fact shows upon its face that it is a mere accommodation endorsement.
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PARTICULARS, BILL OF—Amendment—Discretion . 297
See Practice. 1.

PARTITION—*Heir-at-law—Expectancy—Transfer.*] The expectancy of an heir is capable of being transferred as security for the payment of a just debt, and when the same is done during the lifetime of the ancestor, it will be deemed to be a transfer of all legal and equitable right of such heir's expectancy in the estate of such ancestor; and although there can be no vested estate in the property during the life of the ancestor, a Court of Equity will recognize and protect the interest of the transferee after the death of the ancestor.
Stover *v.* Eycleshimer 290

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PARTNERSHIP—*Any Partner may secure Creditor.*] Either member of a firm has a right to secure a creditor thereof by a transfer of partnership property, or to give a chattel mortgage for that purpose.
McCLELLAND *v.* REMSEN 182

PART PAYMENT—Compliance—Statute of Frauds 263
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PERFORMANCE OF VOID CONTRACT—Statute of Frauds Obligation—Evidence 250
See STATUTE OF FRAUDS. 2.

PLAINTIFF, PRESUMPTION FOR—Nonsuit—Negligence—Railroad 8
See NONSUIT.

PLEADING—*Demurrer—Cause of Action.*] In actions brought under the statute of 1849, as amended in 1853, entitled "An act in relation to suits by and against joint-stock companies and associations," the judgment recovered against the company is not the foundation of the action against a stockholder of the company on failure to satisfy such judgment by execution against the company. The action authorized by the 4th section of the act, against individual stockholders in such cases, is based upon the original cause of action against the company; and in such proceeding the original cause of action must be stated in the complaint.
WHITEHEAD *v.* ALLEN 258

2. ———— *Equitable relief first—Lease—Assignment.*] Under the Code, the same complaint may contain legal and equitable causes of action; the legal causes should be tried by a jury, and the equitable may be tried by the Court.
When the Court erroneously decide, on motion of Plaintiff, that the Defendant is not entitled to a jury because the complaint sets up an equitable cause of action, it is no waiver by the Plaintiff of any legal cause of action contained in his complaint; and should he fail to establish an equitable cause of action, he may, nevertheless, recover upon any legal cause of action which he may establish, as contained in his complaint.
To render the assignee of a lease liable for rent to the lessor, the whole term must be assigned and transferred to the assignee. Therefore, an assignment reserving the last day of the term, does not render the assignee thus liable to the lessor.
DAVIS *v.* MORRIS 226

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See JUDGMENT. 3.

——— SELL REAL ESTATE—Will—Executor—Trustee . 184
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PRACTICE—*Bill of Particulars—Amendment—Discretion.*] A bill of particulars attached to a complaint forms a part of the pleadings in the case; and under the provisions of law authorizing a referee to allow amendments of the pleadings, he may allow such bill of particulars to be amended by the substitution of a new one in its stead. Such permission to amend is in the discretion of the referee, and not reversible.
MELVIN *v.* WOOD 297

2. ———Case.
RIGNEY *v.* SAVORY 296

3. ——— *Service of Process on Convict in State Prison.*] The service of process upon a convict in State Prison is valid to confer jurisdiction upon the Court over the person and rights of the convict. Then, the service of a process commencing a foreclosure suit against the property of the convict is valid to give the Court jurisdiction to foreclose his equity of redemption in the premises . 54
DAVIS *v.* DUFFIE.

PREFERENTIAL ASSIGNMENT — Possession Unchanged — Presumptive of Fraud 129
See ASSIGNMENT.

PRESUMPTION REPELLED—Lapse of Time—Mortgage—Title to Real Estate 24
See TITLE.

PRINCIPAL AND AGENT — *Transfer of Stock Warranty.*] An agent, with express authority to sell, has no implied authority to warrant, where the property is of a description not usually sold with warranty.

One employed to make a sale of bank stock is not, presumptively, empowered to warrant it in the name of his principal.

The receipt of the proceeds, by the owner of the stock, in ignorance of an unauthorized warranty by the agent, is not a ratification of the unauthorized engagement.

When a party claims, receives, and retains the property of another, knowing that it was obtained by an unauthorized use of his name, it is a ratification of the assumed agency, which evinces his assent to the original contract.

So, too, when an agent, acting within the scope of his actual authority, perpetrates a fraud for the benefit of his principal, and the latter receives the fruits of it, he thereby adopts the fraudulent acts of the agent.

But the mere receipt, by the owner, of the proceeds of his own

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property, is not a ratification of a collateral contract made without his authority, and to which he never knowingly assented.
SMITH *v.* TRACY 345
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See NONSUIT.
REAL ESTATE—*Deed not recorded—Consideration not paid—Subsequent Grantee.*] A deed of real estate is not rendered invalid from the fact that the considerations are not paid at the time of its execution and delivery. A subsequent grantee of land, purchasing with knowledge of a prior conveyance, is not a *bonâ fide* purchaser, even though the prior deed be not entered of record.
RING *v.* STEELE 46
——— Executor can enforce Bond to pay Mortgage on Testator's 171
See EXECUTOR.
2. ——— *Location of Boundary—Evidence.*] Actual and continued possession of the premises adjoining the located line is not essential to the existence of *practical location.* It does not depend upon a *pedis possessio* of the land adjoining; but its existence may be established by any competent evidence of the fact.
The surveying out, and fixing upon a line between adjoining properties by the parties themselves, is such a practical location as will control courses and distances; especially when, from the description in the deed or from the decay of boundaries, the line would otherwise become uncertain. But such practical location must have been acquiesced in for twenty years.
As evidence of acquiescence, it is competent to inquire of a witness whose relations to all parties have been such that, had there ever been any dispute about the correct location of such line, he would most likely have heard of it, "Did you ever hear of there being more than one west line," etc., describing the marked line in controversy.
RATCLIFFE *v.* GRAY 117
3. ——— *Possession of Husband under Wife, not adverse—Damages—Interest.*] Where the husband is in possession under the title of his wife, his possession can in no sense be considered as adverse to her, as to those claiming under her.
Under the Code, the Plaintiff seeking to recover possession of land may unite in the same complaint a claim to recover the land with a claim for damages for withholding the same.
Interest is properly allowable upon damages for the unlawful detention of real estate.
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——————— Words—"Good and sufficient Deed"—Construction 211
See WORDS. 1.

RECEIVER—*Compensation of—Discretion of Supreme Court.*] The Supreme Court has authority to fix upon the compensation to be paid to a receiver appointed by it to receive and apply rents pending the controversy attending the probate of a will.

A receiver is an officer of the Court, and as such, in the absence of legislation upon the subject, the Court has authority to determine the compensation to be paid.

GARDINER *v.* TYLER 161

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RELIEF TRIAL, EQUITABLE—Pleading—Lease—Assignment . 226
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RELIGIOUS CORPORATIONS—*Trustees—Cestui que trust—Change of Doctrine.*] A religious society incorporated under the General Act of 1813 (April 5), is a corporation of all the members of such society, and not of the trustees, or a limited portion of the members.

The trustees of such society cannot take a trust for the sole benefit of members of the church, as distinguished from other members of such congregation.

Nor does such statutory incorporation contemplate or recognize the devotion of the corporate property to the support of a perpetual and unchangeable system of religious faith and doctrine.

A majority of the corporators, without respect to their religious tenets, have the entire control over the revenues of the corporation.

GRAM *v.* PRUSSIA EMIGRATED EVAN. LUTH. GER. SOC. . . 339

REMEDY AGAINST TAX ILLEGALLY ASSESSED—Injunction. Code, § 11 106
See INJUNCTION.

REPLEVIN—*Delivery—Title.*] When property contracted to be delivered at a certain place, and at a certain price, has been delivered at the place so that it can be identified, and so that nothing further remains to be done except perhaps to measure or count, so as to determine the amount to be paid, the delivery is complete, and the title is fully vested in the vendee.

HYDE *v.* LATHROP 320

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——— OF PROCESS on Convict in State Prison—Practice . 54
See PRACTICE. 3.

SLANDER—WORDS *must impute Indictable Crime—Evidence, Credibility.*] Words, to be actionable per se, must be such as to impute a crime for which the party would be indictable.

A bawdy-house is a common nuisance, and the person keeping it may be indicted therefor; and to charge a person with keeping a whore-house is actionable per se, as it imputes the misdemeanor of keeping a bawdy-house. Slanderous words are to be construed according to their common acceptation, and not according to the particular understanding of those who hear them uttered.

To impeach the general credibility of a witness, it is not necessary that any one should swear directly that they would not believe the witness under oath.

WRIGHT *v.* PAIGE 134

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———FRAUDS — *Compliance — Part payment.*] A parol contract is not taken out of the Statute by an agreement to apply an existing debt between the parties, as payment of the property contracted for. There must be some distinct act of the parties, in affirmance of the contract, at the time the agreement is entered into.

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STATUTE OF FRAUDS—*Performance of void Contracts—Obligations—Evidence.*] A contract which by its terms is void by the Statute of Frauds, if performed by a party who might have availed himself of the statute, imposes upon all the parties the same obligation as though the same had been legal and binding upon all parties.

A parol agreement,—by which fifteen hundred shares of stock were to have been transferred for a certain consideration to a party, who was to take five hundred for himself, and one thousand for another party,—though void under the statute, yet when the consideration has been paid and the stock has been transferred, the party receiving the stock for the other party cannot set up the statute as an excuse for not delivering the stock under such agreement.

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TITLE TO REAL *Estate—Mortgage—Lapse of Time—Presumption repelled.*] A purchaser, finding a mortgage upon the land purchased, cannot rely upon the presumption arising from the lapse of twenty years, but must ascertain if anything has been done to repel the presumption arising from mere lapse of time. A rule holding the lien of a mortgage discharged after the lapse of twenty years from its becoming due, notwithstanding the mortgagor had paid punctually every year the annual interest, because of a conveyance of the mortgaged premises by the mortgagor without the knowledge of the mortgagee, would be unjust. The registry of such a deed is no notice to the mortgagee.
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TRADE-MARK—*Infringement, what—Injunction.*] Every merchant or manufacturer of an article has the right to establish for his own exclusive use a trade-mark, which becomes his property, and the Courts will protect by injunction or otherwise his use of the same. Any counterfeit or imitation of such mark calculated to impose upon the public, is an infringement of such mark, and will be prohibited by injunction.
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TRUSTEE DYING—*Substitution, what proper.*] When the intestate held personal property as a trustee, under the common law rule it passes at his decease to his personal representatives, who are bound to execute the trust; and consequently they should be substituted in the place of the decedent. But when the Court appoints a trustee by the express consent and stipulation of these representatives, his appointment is a proper substitution.
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USURY—*Estoppel.*] An accommodation endorser of a note that is usurious in its inception, informing a purchaser of the note that the same is valid, and thereby inducing him to buy the note, will thereby be estopped from setting up its usurious character in an action against him on his contract of endorsement.
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WILL—EXECUTOR—*Trustee—Power to sell Real Estate.*] Where the testator bequeathed and devised all his estate to his wife during her life, or widowhood, with remainder to his four children, and afterwards by codicil authorized his wife to sell and dispose of his real and personal state, or any part of it, as she should deem most expedient for the best interest of all his legatees, held, that this did not authorize her to deed certain real estate to one of the children, in payment of a debt due him from the estate.
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which he refused to take for said land: Held, that said grantee was under no legal obligation to sell such land at any price; and that until he did sell for, or above, the price named, he was not liable to pay the five hundred dollars.

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TRANSCRIPT APPEALS.

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Transcript Appeals.

Vol. 4.

THE

FILE OF OPINIONS

IN CASES ARGUED BEFORE THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

DURING THE

SEPTEMBER TERM,

1867.

FROM OFFICIAL COPIES CERTIFIED BY

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Transcript Appeals.

SEPTEMBER TERM,

1867.

GEORGE H. McINTYRE, Administrator, &c., *v.* THE NEW YORK CENTRAL RAILROAD CO.

Injuries causing death—Measure of damages—Notes of Testimony—Evidence.

It is not negligence for a passenger in a car, when there are no seats unoccupied, to attempt to pass to another car for a seat, in obedience to the direction of Defendant's employé.

The question of contributing negligence is one of fact, and belongs to the jury.

In an action for producing death by negligence, &c., the jury must be satisfied that pecuniary injuries have resulted; and if so satisfied, they are at liberty to allow them from whatever source they actually proceeded, and which could produce them.

The Plaintiff brought this action, under the statute, as administrator of Mrs. Susannah Knight, deceased, in behalf of her next of kin, to recover damages for her death, alleged to have been caused by the negligence of the employés of the Defendant, in November, 1859. It was proved on behalf of the Plaintiff, upon the trial, that Mrs. Knight, in company with her father, an old man, took the cars of the Defendant at Schenectady, and proceeded to Syracuse, occupying the rear car of the train. At Syracuse the car in which they were seated was detached from the train, and they were directed to go forward into the next car. The testimony on the part of the Plaintiff was to the effect that they had barely time to reach the next car when the train was started.

There were no seats in the car which they entered; and they

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were directed by a man carrying a lantern, and appearing to be one of the employés of the road, to go forward—that there were seats forward. In compliance with this direction, Mrs. Knight and her father attempted to reach the next forward car, the train being at that time in rapid motion; but in passing from the one platform to the other, she fell between the cars, and was instantly killed. It was a dark and somewhat stormy night—a rain or sleet falling and freezing. It was further proved, on behalf of the Plaintiff, that the deceased was under fifty years of age at the time of her death, in vigorous health, and accustomed to earn about a dollar per day by her labor as a seamstress. She left three children—two sons and one daughter; all of them were over twenty-one years of age, and living away from their mother. It was shown that she was in the habit of making articles of clothing, and sending them to her children from time to time.

On behalf of the Defendant, the conductor and brakeman on the train in question testified that the deceased carried a band-box, bundle, basket, and flower-pot, and that her father had a carpet-bag; and also that the direction to the passengers to pass into the forward car was made as soon as the train reached Syracuse, where a stoppage was made of some ten or twelve minutes.

The jury found a verdict for the Plaintiff for $3,500, and the Special Term denied the motion of the Defendant for a new trial.

The General Term, on appeal, directed a new trial, unless the Plaintiff would stipulate to accept a reduction of the verdict.

This the Plaintiff consented to do; and from the judgment entered accordingly for $2,387.57, the Defendant appeals to this Court.

O. S. H. Hovey for Plaintiff.
Edward Harris for Defendant.

FULLERTON, J.—It cannot be considered negligence on the part of the person killed that she attempted to pass from one car to another, in obedience to the orders of the Defendant. She was not only directed to go forward into another car in the night-

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time during a storm, and when the train was in motion, but it was necessary for her comfort and convenience that she should do so.

The car to which she was directed to go, when the train stopped at Syracuse, was filled with passengers; and the alternative was presented to her of incurring the risk of the transit, or of remaining standing with an aged companion, whose strength, it may well be concluded, was unequal to such a position. She had a right to a seat, and it was the duty of the Defendant to provide her with one.

If, in discharging that duty, they required her to perform an act which was perilous in itself, and in doing which she lost her life, the negligence, if any, which that act involved should be imputed to the company alone.

The rule that contributory negligence will prevent a recovery by the party suffering the injury ought not to be applied to such a case.

It would seem to be manifestly unjust to characterize as negligence the act of yielding obedience, under such circumstances, to the requirements of the party inflicting the injury, and to hold as between the parties themselves that it should deprive the party injured of all legal redress.

It would be a novel as well as a dangerous rule to hold that a railroad company should enjoy immunity from liability, when the act which occasioned the injury was undertaken under its direction, and was one which the passenger must perform in order to procure the seat which the company was bound to furnish.

I admit that passing from one car to another in a dark and stormy night, when the train was in motion, encumbered with baggage, and having charge of an aged person, was an act fraught with imminent peril, and, if done without sufficient reason, one involving great negligence. But having been undertaken at the request of the company, it is to be regarded as their act, and attempted at their risk.

Unless this view of the case is adopted, railroad companies may be guilty of the grossest wrongs without incurring liability. In performing their contract, they may require a feeble and inexpe-

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rienced person to incur fearful risks, and then claim to be without fault in law, on the ground that the passenger who may have suffered an injury was negligent in following their reckless directions. The very statement of such a case suggests the necessity of so administering the law as to obviate so great an evil.

There was no error, therefore, in the rulings of the Judge who presided at the Circuit, touching the negligence of the deceased.

There was some slight evidence that the next of kin of the deceased sustained some pecuniary loss by her death. She was, at the time of her death, about fifty years of age, industrious in her habits, and in the enjoyment of robust health. It also appeared that she left three children living, who were supporting themselves away from home. She was in constant communication with them, and was in the habit of making and sending to them some articles of clothing. It cannot, therefore, be said that her children had no pecuniary interest in her life, even if that term is used in its most limited signification. The extent of that interest was a question for the jury, and was fairly submitted to them on the evidence.

When we consider the defect which the statute was designed to remedy, it is taking too narrow a view of the matter to say that the word *pecuniary* was used in so limited a sense as to embrace only the loss of money.

Such a limitation would be, in many cases under the statute, a mere mockery, because it would afford no substantial relief in the very cases in which it is most needed.

The loss of the society of a deceased relative, the injury to the affections of those surviving, cannot be regarded as being within the remedy of the statute, because in no sense can the loss be regarded as pecuniary. But to children the loss of a parent involves the loss of many other things which this Court has heretofore regarded as of a pecuniary character, and as the subjects of consideration by a jury in assessing the damages under the statute (Tilley *v.* Hudson River R.R. Co., 24 N. Y. 471).

It is true that these children were away from home, probably were of full age, and not immediately dependent upon their

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mother for support. But the evidence also shows that they were not beyond the reach of a mother's care and bounty. Out of her earnings, insignificant as they were proved to be, she provided small articles of clothing for them, and the jury had a right to find that her death involved them in a pecuniary loss.

The statute under consideration has presented some difficult questions of construction; but the courts have taken a humane view of them, and have endeavored to effectuate what may fairly be presumed to have been the intention of the legislature in providing a remedy unknown to the common law. It would not, therefore, have been proper for the Judge to have instructed the jury, as he was requested to do, that the Plaintiff was entitled to recover only nominal damages.

There is no precise rule which a jury can adopt in estimating such damages.

The question should always be left, as it was in this case, to their judgment upon the whole case; and when the question has been fairly submitted, and the damages are not excessive, their verdict should not be disturbed.

It follows, from these views, that the exceptions to the Judge's charge were not well taken, and the judgment should be affirmed.

DAVIES, CH.J.—Upon the trial of this action the following facts appeared: On the 14th day of November, 1859, Mrs. Knight, the Plaintiff's intestate, started from Rutland, Vermont, in company with her father, to proceed west into the State of Pennsylvania.

They took the Defendant's cars at Schenectady, and proceeded thereon to Syracuse.

On arriving at that place they were seated in the rear car of the train, which the employés of the Defendant there determined to detach from the train and leave at that place.

That it was so to be left was announced by the brakeman to the passengers in that car, and they were requested by him to leave it and go into the forward cars.

The passengers immediately left that car and went into the one next forward of it.

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The train started about the time the passengers got into this car; and there being no seats in it unoccupied, the passengers were compelled to stand, and were standing in the aisle of the car. At this time, and after the train had started, an employé of the Defendant came into the car with a lantern in his hand, and said: "Go forward; there are plenty of seats forward; go forward, if you want seats."

Some of the passengers then went forward while the cars were in motion, and among them was the deceased.

Mrs. Knight, in stepping from one car to another, either did not step far enough, or her feet slipped, and she fell between the cars and was killed.

It was a dark night, and it did not appear that any of the employés of the company were aiding or assisting the passengers in their passage from one car to the other.

Testimony was given of the age and circumstances of the deceased.

She was between forty-five and fifty years of age, and lived with a married daughter who had a family of children. She also left two sons, who were of full age.

The jury gave a verdict for the Plaintiff, finding the damages at $3,500; and on appeal to the General Term, that Court ordered a new trial, unless the Plaintiff would remit $2,000 of the verdict, and leave it to stand for the sum of $1,500, which the Plaintiff did, and judgment was entered for the latter sum, with interest; and from which judgment, as so modified and entered, the Defendant appeals to this Court.

It is now urged by the counsel for the Appellant that there was evidence that the negligence of the deceased contributed to the injury, and that consequently there can be no recovery; and he insists that that was a question for the Court to decide, and that it was error to leave to the jury the question of the Plaintiff's negligence or contributory negligence.

There was much evidence tending to show that, in moving from the one car to the other, the deceased was but obeying the directions of the employés of the Defendant; and it was eminently proper

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for the Judge to leave to the jury the question whether, under the circumstances disclosed, the deceased was guilty of any negligence in complying or attempting to comply with those directions. The learned Judge properly told the jury that they could judge whether it was safe for a woman to travel with her encumbrances on such a night as that is represented to have been; that they could judge, too, whether it was right and proper for her, in order to get a seat, to undertake to pass from one car to another; and that they could judge whether it was reasonable and proper for her to rely upon the directions of a man appearing to be in his place as an employé of the company. And he further instructed the jury that, if it was negligent for Mrs. Knight to follow the directions of this man with the lantern, it must have been such negligence as contributed to her death. The jury by this verdict have announced that it was not negligent for the deceased, under the circumstances, to follow the directions of the man giving the same.

The Court could not say, as matter of law, that it was negligence on the part of the deceased to follow that direction; and whether there was negligence or not, was therefore properly left to the jury; and they have responded that there was no negligence on the part of the deceased, and that settles this question.

I am unable to discover any error in the charge of the Judge in reference to the damages which the Plaintiff was entitled to recover. At the request of the Defendant's counsel, the Judge charged the jury that the burden of proof was upon the Plaintiff to prove the pecuniary injury, and such facts as could enable the jury to determine what would be a fair and just compensation, with reference thereto, to the next of kin, to entitle the Plaintiff to recover more than nominal damages. And also that the jury had no arbitrary direction in regard to the amount of damages, but must be governed by the weight of evidence as to what would be a fair and just compensation, with reference to the pecuniary injuries sustained by the next of kin.

These directions were in strict accordance with the doctrine as

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laid down by this Court in the case of Tilley v. Hudson River Railroad Co. (24 N. Y. 471, and S. C. 29 N. Y. 252).

That portion of the Judge's charge on this subject, to which exception was taken by the Defendant's counsel, was also in harmony with the opinion of the Court in the case last cited, and is but a reiteration of the doctrine there enunciated.

He there said: "The jury are to give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death. They are not tied down to any precise rule. Within the limit of the statute as to amount, and the species of injury sustained, the matter is to be submitted to their sound judgment and sense of justice. They must be satisfied that pecuniary injuries resulted. If so satisfied, they are at liberty to allow them from whatever source they actually proceeded which could produce them. If they are satisfied, from the history of the family or the intrinsic probabilities of the case, that they were sustained by the loss of bodily care or intellectual culture, or moral training, which the mother [in that case] had before supplied, they are at liberty to allow it. The statute has set no bounds to the sources of these pecuniary injuries."

The charge of the Judge to the jury, in the present case, is unobjectionable in the light of this authority.

Upon the trial a witness was asked: "At the time of the death of the deceased, what was she capable of earning?" This was objected to by the Defendant's counsel on the ground that it was not competent on the question of the worth of this woman's life to the next of kin.

The Court overruled the objection, and the Defendant's counsel excepted.

It does not appear that the question was answered. The witness was then asked: "And what did she usually earn?"

This was also objected to on the same ground; and the objection was overruled, and an exception taken. The witness answered: "Her services commanded readily, at that time, at least one dollar per day in addition to her board." It is now urged

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that both of these questions were improper, as calling for the opinion of the witness.

It is a sufficient answer to say that no such objection was taken upon the trial. And if taken as applicable to the first question put, it is now wholly immaterial, as that question was not answered. And such an objection could have no pertinency in reference to the second question.

This question does not call for any opinion, but for a fact—"What did she usually earn?"

This was a material and important inquiry, in forming an estimate of the pecuniary loss sustained by the next of kin, by the occasion of the death of the deceased.

Upon the authority of the case of Clark v. Vorce (15 Wend. 193), the Judge committed no error in allowing the notes of the testimony of the witness Seeley (who had in the meantime died), taken by Mumford upon the former trial, to be read in this trial.

In that case the witness testified that, on the former trial, he acted as counsel for the Defendant, and took very full and particular minutes of one Haight's testimony; that he intended at the time to take down the words of Haight, but could not pretend to give his precise words; that he could not swear to Haight's testimony, except from the minutes taken by him on that trial, and could not now testify that he had taken down every word of his testimony; but he intended, at the time, to take down all he regarded as material.

The Supreme Court thought the testimony should have been received. Ch.J. Savage observed: "There are few or no cases where a cautious and prudent man will swear that his notes of testimony of a witness, taken down at the time, contain his very words, and all his words."

In Huff v. Bennett (2 Seld. 337), the learned Judge who presided at the trial of this action, and admitted the notes of Seeley's testimony, in delivering the opinion of the Court, said: "The case of Clark v. Vorce (supra) was very different from this case. The witness says he cannot swear that his minutes contained the

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testimony of Scott accurately, and that he may have omitted things that he testified to. He does not say he believes his minutes are correct, nor that he intended to take down the words of the witness."

In the present case, the Plaintiff called one of the counsel of the Defendant to prove the testimony given by the witness Seeley on a former trial of this action, he having since that trial died. He testified that he was one of the counsel for Defendant in this action; was present at the former trial, and took notes of testimony; he had them there in Court. He says: "So far as I took minutes, I took them as given by the witness, so far as I could; I designed to take the substance of the testimony as given by the witness, and presume from that I have; I have no recollection of the testimony aside from what I have here."

On his cross-examination he said: "Should judge that it was not possible for me to take the whole testimony verbatim; did not aim to take more than the substance; do not say that I have the whole language of the witness, nor the whole of his testimony." In response to the Court, the witness said: "I have no recollection of the witness or of the testimony; not the slightest whatever; I have his testimony on my minutes, and presume it is the substance of his testimony."

The Plaintiff's counsel then offered to read the evidence of Austin H. Seeley as given upon the former trial, as shown by the notes of testimony taken by the witness. The Defendant's counsel objected, on the ground that it did not appear that the whole of the testimony was taken, or that the testimony as given was taken down, and that the necessary preliminary proof of the accuracy of the notes had not been made.

The Court overruled the objection, and admitted the evidence, to which the Defendant's counsel duly excepted.

When it is observed that the witness called upon to prove the accuracy of his notes was manifestly an unwilling witness, it cannot fail to be seen that his whole testimony, when taken together, comes fully up to the doctrine of Clark v. Vorce (supra).

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There was no error, therefore, in the admission of the notes taken by Mumford of Seeley's testimony.

It follows that the judgment must be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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ABRAHAM EVELAND v. GEORGE WHEELER, ADMINISTRATOR OF RUFUS G. BOWMAN, DECEASED.

Contract—Entirety—Cancellation—Consideration.

Where parties to a contract for the purchase and sale of land (a part of the price of which is secured by bond and mortgage on other property) agree to cancel and surrender the contract of purchase, and do so, and nothing is said or mutually understood as to the cancellation of the bond and mortgage, the consideration for which the bond and mortgage were given being cancelled, the bond and mortgage are likewise to be deemed cancelled.

THIS action was brought to obtain the cancellation of a bond and mortgage at the time in process of foreclosure by Defendant's intestate.

Issue being joined, the case was referred to a referee to hear and determine, who reported in favor of the Plaintiff, and directed judgment that the mortgage be discharged of record, and with the bond be given up and cancelled.

The mortgagee was also perpetually enjoined from further attempt to enforce them as valid instruments.

On appeal, the Supreme Court, at General Term, reversed this judgment, and ordered a new trial, from which order an appeal was taken by the Plaintiff to this Court; which appeal was accompanied by a stipulation that in case such order should be affirmed, judgment absolute might be entered against him.

The material facts found by the referee, and here necessary to be considered, are as follows: In March, 1855, the Plaintiff and Defendant's intestate entered into a written contract, by which said intestate agreed to sell and convey to the Plaintiff a certain farm in the town of Castile, county of Wyoming, containing about one hundred and six acres, for the sum (as expressed in the written contract) of three thousand dollars. On the same day the Plaintiff, with one Charles Strong as his surety, executed and delivered to said intestate his bond, in the penal sum of $3,130, conditioned to pay the latter $1,565.31, with interest, in instalments, as stated therein; and at the same time the Plain-

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tiff, with his wife, executed and delivered to said intestate a mortgage, to accompany said bond, upon other lands, to secure the sum mentioned in the condition of that instrument; which mortgage was duly acknowledged, and was recorded in the county of Wyoming, where the lands covered thereby were situated. The remaining facts found by the referee are given in his fourth, fifth, sixth, seventh, and eighth findings, and here follow verbatim:

Fourth. The price or sum for which said tract of land, containing one hundred and six acres and seventeen-hundredths of an acre, was contracted to be sold, was forty-three dollars an acre, or four thousand five hundred and sixty-five dollars and thirty-one cents; and the said agreement above mentioned, and said bond and said mortgage, were executed and delivered to secure to the said Plaintiff the conveyance of said tract of land described in said contract, and to secure to said Defendant the purchase-price of said land, and for no other object, purpose, consideration, or qualification, except as particularly stated and set forth in said written contract.

Fifth. The Plaintiff, immediately after the making, executing, and delivery of said contract, bond, and mortgage, entered into the possession and occupancy of said tract of land described in said contract, and used, occupied, and enjoyed the same, and received the rents, profits, and proceeds thereof, and made repairs and improvements thereon for the period of about four years after the making, execution, and delivery of said contract, bond and mortgage, and made various payments upon said contract, and one payment upon said bond and mortgage, amounting to between four and five hundred dollars in the aggregate.

Sixth. It was afterward, either in the year 1858 or spring of 1859, mutually agreed between the Plaintiff and the Defendant that said written contract should be cancelled and annulled, and that said Plaintiff should surrender up and relinquish to said Defendant said tract, piece, or parcel of land described therein, and all claim, right, *title, or interest in and to the same, and to all payments made on said contract, bond and mortgage*, and also that

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the Plaintiff should work said farm on shares, and the Defendant was to have one-half of the crops raised thereon.

Seventh. The Plaintiff did work said land on shares, and the Defendant received his half or share of the crops raised thereon; and said written contract was afterward, and on or about the 1st of April, 1860, cancelled by cutting or tearing off the seals of the same, and the Defendant resumed the exclusive possession and control of said tract, piece, or parcel of land.

Eighth. No agreement was ever made or entered into between Plaintiff and Defendant as to the cancellation of said bond and mortgage, or whether the same should or should not be deemed cancelled or discharged by the cancellation of said contract; on the contrary thereof, it was the *design and intention of the Defendant to retain and keep said bond* and mortgage in full force and effect; and the *Plaintiff designed and intended* that said contract, bond and mortgage, should all be cancelled and annulled.

As conclusion of law, the referee held and decided that the contract and bond and mortgage constituted one indivisible contract, and that the cancellation and annulling of the written contract was in law a cancellation of the bond and mortgage; and he directed judgment for the Plaintiff accordingly. The judgment was reversed by the General Term, on the ground, as appears from the opinion then delivered, that although the written agreement, bond and mortgage, were given at the same time, and related to the same subject, and for the purpose of construction were to be regarded as one contract, yet that they were divisible in their nature, and should, under the facts found, be deemed to stand separate and independent of each other; and consequently that the cancellation of the written contract, *of itself*, did not affect the validity of the bond and mortgage.

H. L. Comstock for Appellant.
L. W. Thayer for Respondent.

BOCKES, J.—It is not controverted, nor can it be, that the written agreement and bond and mortgage are, for the purpose of construction, to be read together, as constituting one contract.

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The referee so correctly adjudged; and this was taken for granted or assumed by the Supreme Court. The three instruments were executed at the same time, were between the same parties, and related to the same subject-matter. Taken together, and not otherwise, they show the entire agreement. The authorities in support of this proposition are numerous, and are quite too familiar to require citation. So read and construed, the entire agreement, in its most material parts and significance, was to this effect: that the Defendant's intestate would convey the farm to the Plaintiff, who, in consideration thereof, would secure and pay to the former $4,565.31—the sum of $3,000, as stipulated in the written contract, and the balance of $1,565.31 by his bond and mortgage, covering other property—the terms of which were then agreed on and inserted in such instruments, which instruments were then executed and delivered.

The papers, taken together, evidenced a perfect agreement, and the entire agreement between the parties. They showed as well the duty of the intestate to convey, as also the obligation of the Plaintiff to secure payment of and to pay the entire sum constituting the consideration of the conveyance. Payment, or the securing of payment, to the intestate, according to the terms of the agreement, was the consideration for the conveyance; and the conveyance was the consideration for such payment. The promises were mutual and dependent. A conveyance could not be required without payment, or the securing of payment, according to the terms of the agreement; nor could payment be enforced without the delivery or tender of the conveyance. Under this condition of duty and obligation, the parties, by mutual consent, cancelled and annulled the written contract, and the Plaintiff surrendered to the intestate the farm, the possession of which he had held, under the agreement to purchase, for the period of about four years. During his occupation the Plaintiff made repairs and improvements on the farm, and also various payments on the contract, and one payment on the bond and mortgage, in the aggregate amounting to between four and five hundred dollars; all claims for which repairs, improvements, and

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payments were relinquished by him on such cancellation. There was not, however, any express agreement between the parties that the bond and mortgage should or should not be deemed cancelled and discharged by the annulling of the contract; on the contrary, as the referee certifies, "it was the design and intention of the Defendant (the intestate) to retain and keep said bond and mortgage in full force and effect; and the Plaintiff designed and intended that said contract, bond and mortgage, should all be cancelled and annulled." Notwithstanding this diversity of intention and mutual misunderstanding of the parties, neither asks to be restored to his former position for that cause, but both plant themselves on the surrender and cancellation of the written contract, hold it as binding and conclusive as regards their rights, and demand an adjudication by the Court as to its legal effect. The question then is, did the cancellation of the contract, ipso facto, also cancel the bond and mortgage?

We are of the opinion that such was its legal effect, in the absence of an express agreement between the parties to the contrary. On the cancellation of the contract the intestate was discharged from all obligation to convey, which obligation constituted the sole consideration for the Plaintiff's promise to pay. The essential element to the validity of the bond and mortgage—a consideration—was then wanting. They might undoubtedly have been kept in force by an express agreement to that effect, having for its consideration the cancellation of the contract, and the surrender of the premises contracted to be conveyed. But no such condition was imposed. The instruments must, therefore, stand or fall with the consideration on which they were made to depend in their inception. We are not without authority on this question.

In Dearborn v. Cross (7 Cow. 48), the former bound himself by bond to sell land to the latter, who gave his notes for the consideration-money, and took possession. Afterward the land was surrendered to Dearborn, who sold it to another. It was held that although the bond was not cancelled or surrendered, yet it was in legal effect discharged, and consequently no action could be maintained on the notes.

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In De Peyster v. Pulver (3 Barb. 284), it was decided that when a contract has been abandoned by mutual agreement of the parties thereto, one party cannot sue the other upon a note given as a part of the consideration for the performance of the contract by the party suing. In this case it was remarked by the Court, per Harris, J.: "The acts of both parties sufficiently show a mutual agreement that the contract between them should be abandoned. The contract being thus abandoned by mutual agreement, the note for which this action is brought, and which was given as a part of the consideration for the performance of the contract by the Plaintiff, cannot be recovered."

So in the case now under examination, the consideration of the bond and mortgage sought to be set aside and annulled was the agreement by the Defendant's intestate to convey to the Plaintiff the farm described in the contract. This agreement to convey was cancelled by mutual consent of the parties, without any agreement that they should remain on foot as valid, obligatory instruments. There is, therefore, no good reason for their enforcement; and they must be deemed to be invalid, like other contracts, the consideration of which has wholly failed.

When, as in this case, the failure of the consideration touches the principal point and essence of the contract, such failure constitutes good ground in equity to set it aside. These considerations require a reversal of the order of the General Term.

There is another view of the case not without significance. The referee finds that the Plaintiff intended that the bond and mortgage should be cancelled, and that the Defendant's intestate intended the reverse.

Did the intestate, although intending the reverse, know of Plaintiff's understanding and intention? If so, and he permitted him to act upon such understanding, he is now bound by it, inasmuch as he retains all the advantages of the arrangement.

In such case he will be concluded on well-settled principles applicable to the doctrine of estoppel.

We think it quite probable, from the facts found, that the intestate knew of the Plaintiff's intention and understanding at

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the time of the cancellation of the contract. But it is unnecessary to consider this question. The order appealed from must be reversed, on the ground above discussed, unless evidence was admitted or rejected prejudicial to the Defendant's rights. On a careful examination of the case, we are of the opinion that no error exists in this regard.

The order appealed from must be reversed, and the judgment directed by the referee affirmed, with costs.

All concur except GROVER, J.

Affirmed.

JOEL TIFFANY,
State Reporter.

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CHARLES KING, EDWARD J. KING, AND SYLVESTER BRUSH, RESPONDENTS, v. WILLIAM H. PLATT, SPENCER C. PLATT, AND NATHAN C. PLATT, EXECUTORS OF NATHAN C. PLATT, DECEASED, APPELLANTS.

Constructive fraud—Specific performance—Judicial sale—Election day—Statute, Construction of.

A judicial sale, although conducted by an officer of the Court, and under its direction, is not the business of the Court within the meaning of the statute providing, that "no Court shall be open or transact any business in any city or town on the day of elections, for other than town or militia officers."

But a sale made against Defendant's remonstrance on a day most unfavorable to a large gathering, and the lots sold in an order which induces a reasonable belief that it was detrimental to Defendant's interest, and under circumstances giving rise to apprehensions that free competition was interfered with, in equity it will be set aside.

THE action was brought in February, 1861, to compel the specific performance by Nathan C. Platt, the original Defendant, since deceased, and now represented in the action by the present Defendants, of an agreement to purchase real estate in the city of New York, which agreement was made September 6, 1860. The Defendant not having complied with the terms of the agreement, for the alleged reason that outstanding judgments unsatisfied existed as a lien upon the property, and not having answered the complaint, judgment was entered in favor of the Plaintiffs on the 15th of March, 1862. By this judgment it was determined that the balance of the purchase-money unpaid, with interest, was $78,412.60, and it directed the Defendant to complete the purchase within ten days, by paying the costs of suit, &c., and $22,160.60 of the purchase-money due, and to execute and deliver his bond and a mortgage on the premises for $56,250, payable October 6, 1866, with semi-annual interest; and that in default of so doing the premises should be sold at public auction; and that the Defendant should be liable for any deficiency that might occur on such sale.

The Defendant did not appeal from this judgment, nor comply with the terms thereof. Accordingly, the premises were adver-

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tised for sale, under the terms of the judgment, on the 18th November, 1862, and the same were sold at public auction on December 2, 1862, when the property was bought in by or on behalf of the Plaintiffs, at a price which left a deficiency of about $10,000 against the Defendant; and on December 22, 1862, the premises were conveyed by the referee on the sale to the Plaintiffs, the report having been duly confirmed.

On February 12, 1863, the Defendant procured an order requiring the Plaintiffs to show cause why the sale should not be set aside, and a resale ordered. The affidavits to sustain this order, and the motion made thereon, disclosed the following causes or grounds of complaint:

1. That the sale was made on the day of a charter election in the city of New York.

2. That the auctioneer named in the notice of sale did not personally officiate at its commencement.

3. That the price bid was inadequate.

4. That the Plaintiffs approached bidders at the sale, and deterred them from bidding, and prevented competition.

The counter-allegations denied Nos. 3 and 4 of these charges, and, on the hearing of the motion at Special Term, it was referred to a referee "to take proof whether any, and if so, what, inducements, communications, or representations were made or held out by the Plaintiffs or their agents, or in their behalf, or by the referee, to deter or prevent bidding at the sale."

On the coming in of the report, made in pursuance of said order, and on the 18th December, 1863, the motion was denied.

On an appeal to the General Term, the order of denial was affirmed, January 23, 1865. The Defendant now comes to this Court, on appeal from the order of the General Term.

William R. Martin and *James Emott* for Appellants.
John H. Reynolds for Respondents.

FULLERTON, J.—The sale of the Defendant's property was not void because it took place on the day of the charter election in the city of New York.

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The statute provides that no Court shall be opened, or transact any business in any city or town, on the day of elections, for other than town or militia officers (1 R. S., 5th ed., p. 418, §§ 4 & 5).

A judicial sale, although conducted by one of the officers of the Court, and under its direction, is not the business of a *Court*, within the meaning of this statute. The object of the law referred to, undoubtedly, was to remove all obstacles which might necessarily interfere with the free exercise of the elective franchise. If the ordinary business of the Courts were permitted on election days, the attendance of witnesses and jurors could be compelled by compulsory process, and in that way they could be forcibly kept from the polls.

It was to avoid such an evil that the statute was passed. A judicial sale of valuable property on an election day, presenting a tempting opportunity for gain, might induce sordid men to forego the privilege of electors in order to promote their private interests; but their action would be voluntary, and freedom of action was all the law intended to secure.

The propriety of a forced judicial sale of a large and valuable property on an election day, when public attention would necessarily, to a great extent, be turned to other objects, after a written notice from the person who was to be most affected by it that he would consider it "unjust and oppressive," was, at least, very questionable; and although not of itself, perhaps, sufficient to warrant the Court in setting aside the sale, yet in connection with the other facts disclosed in this case, cannot fail to create in the mind an influence unfavorable to the Plaintiffs.

The property which was the subject of this sale consisted of eight lots, situate on the corner of Fifth Avenue and Fifty-ninth street, in New York city, at one of the entrances to the Central Park.

The order in which these lots should be sold was considered by the Defendant a matter of interest to him, and, consequently, on the day of sale, he made a written request that the *corner* lot, which was conceded to be the most valuable, should be sold first.

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This request was made with the view to cause the property to bring the largest price, and was therefore a proper and reasonable one. It was not, however, acceded to, and the lots were sold in a different order. I have examined the papers in this case with care, to see what reason was assigned or could have existed for this course, and I have been unable to find any that is satisfactory. The referee who sold the property states, in his affidavit, that "in the exercise of his discretion" he caused the premises to be sold in parcels, and in the order adopted at the sale.

That the referee acted in good faith, so far as *his* action is concerned, his well-known character for integrity leaves no room to doubt; but no reason for believing that the sale of the corner lot first, as requested, would have been *detrimental* to the sale, having been furnished by the affidavits, or suggested on the argument, I cannot but think that the referee's discretion was exercised unwisely. That the Defendant's request was made in good faith, and founded on the belief that, if granted, it would have increased the amount which the whole property would have brought, cannot be doubted, and in that opinion he is sustained by six other persons who are experienced in the sale of property of a like character in the city of New York.

The case, therefore, resolves itself into just this: that while the sale of the corner lot *first could do no harm*, there was good reason to believe that it would result in a *benefit*. Under such circumstances it is difficult to arrive at any other conclusion than that the Defendant was unfairly dealt with. Whatever chance there was, however slight, that the order of sale he requested should be adopted would prove beneficial, he was entitled to, and to deprive him of it was a constructive fraud.

I have not overlooked the affidavits, on the part of the Plaintiffs, expressing the opinion that the property would have brought no more than it did, if the corner lot had been sold first; yet I can see no good reason for not trying, at the least, a harmless experiment to gratify a reasonable request of a failing and unfortunate debtor, which he thought would result to his advantage.

I do not agree with the learned counsel for the motion that

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the Defendant had the right to determine the order of sale, and the authorities quoted do not sustain that position. But, in the absence of all directions by the Court, the Defendant has a right to be heard on the subject, his suggestions considered, and if for the best, followed.

But in the light of the other facts in this case, it is difficult to believe that the refusal to accede to the request was the result of indifference or mere caprice. The Plaintiffs bought the whole of the property at the sale. Their right to do so, of course, is not disputed.

If it were fairly done, without any undue advantage, a Court of Equity would not interfere with the sale. But, besides matters already considered, there are facts disclosed in the papers which give rise to serious doubts as to the entire fairness of the Plaintiffs' conduct at the sale.

From the whole evidence, it satisfactorily appears that the Plaintiffs manifested a desire, before the sale, to purchase the whole of the property, and resorted to the means necessary to accomplish their object.

Raynor, who sustained intimate friendly and business relations with the Plaintiffs, and who acknowledged that he would have the selling of the property as broker, in case the Plaintiffs should purchase it, said to a bidder at the sale that he could purchase the property in one parcel, *after* the sale, upon better terms than he could get it *then* by bidding.

Raynor also testified that he made this communication at the request of one of the Plaintiffs.

That this had a tendency to prevent competition at the sale, can hardly be denied; and whether this effect was designed or not, it is equally fatal to the validity of the sale.

There is other evidence tending to show that the sale was chilled by the course pursued by the Plaintiffs; but it is unnecessary to pursue the subject further.

The sale having been made against the Defendant's remonstrance, on a day most unfavorable to a large gathering, and the lots having been sold in an order which induces a reasonable belief

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that it was detrimental to the Defendant's interests, and under circumstances which give rise to apprehensions that free competition was interfered with, it ought not to stand.

Whilst the Court secures to the creditor his just demand, and sequestrates the property of the debtor to satisfy it, it still sedulously guards his interests in all the various steps taken leading to a sale of his property. The unfortunate debtor is not beneath its protection. It will not tolerate the slightest undue advantage over him, even by pursuing the strict forms of the law, or positive rules (Story's Eq. Jur., § 239).

Occupying the position of advantage, it behooved the Plaintiffs to pursue their remedy with scrupulous care, lest they should inflict an injury on one who was comparatively powerless.

A Court of Equity justly scrutinizes the conduct of a party placed by the law in a position where he possesses the power to sacrifice the interests of another in a manner which *may* defy detection, and stands ready to afford relief on very slight evidences of unfair dealing, whether it is made necessary by moral turpitude, or only by a mistaken estimate of others' rights.

I feel quite convinced that sufficient reasons exist for setting aside this sale, and that justice will be subserved by doing so, for it cannot result in any loss to the Plaintiffs.

The rights of third parties do not intervene, and the Plaintiffs have a lien for the taxes and assessments they have paid (Kortright *v.* Cady, 23 Barb. 490). A resale will probably result in satisfying the judgment and all the outlays of the Plaintiffs, and that is all they can reasonably ask.

If the parties fail to agree upon the order in which the property shall be sold, either party can apply to the Court for instructions to the referee (Collier *v.* Whipple, 13 Wend. 229).

The orders of the General and Special Terms should be reversed, the sale set aside, and a resale ordered.

All concur except PARKER, J.

PARKER, J. (dissenting).—This was an application to the Supreme Court to set aside a sale of real estate had under a judgment in

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the action, which was for a specific performance, and for a resale of the premises, on the grounds that the sale, which was in the city of New York, was made on the day of the charter election in that city; that the referee refused to sell the lots in the order requested by the Defendant; and that the Plaintiff, with a view to bid off the premises himself, discouraged bidders from bidding, whereby he was enabled to purchase the property at less than its value.

The sale cannot be pronounced irregular because held on the day of the charter election, for the prohibition of the statute against the transaction of business by courts upon the day of election does not extend to judicial sales. The circumstance of a sale being held upon that day, against the remonstrances of the Defendant, may be an element in a case made for setting it aside as unreasonably conducted, when, in consequence of such election, bidders did not attend, and the property for such reason failed to bring a fair price. But no such facts appear in this case.

The refusal to sell the lots in the order requested by the Defendant is, in verity, no reason for setting aside the sale. It does not appear that the referee abused his discretionary authority in regard to the order of selling, or that the Defendant is harmed by such refusal. The only subject of inquiry is, whether the Plaintiff so interfered as to prevent or discourage bidders from bidding, to the prejudice of the Defendant.

The evidence, I think, comes short of showing any such interference. It is a sufficient answer to this allegation of the Defendant, that the whole evidence, without any contradiction, shows that the property brought all it was worth. Not a single witness swears that he would have been willing, on the day of sale, to give more for the property than it brought on the sale.

Several, it is true, speak in general terms of its having been sold at low prices; and two say if it were "*now*"—that is, at the time of swearing, which was some months after the sale—put up at auction, it would bring considerably more than it did bring on the sale.

But it is shown that between the day of sale and the time thus

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spoken of, gold had advanced from 131 to 150 and more, and that real estate had risen in the market from that cause, as well as from an increased desire to invest in it. The sale was fairly conducted, and the property brought all it was worth. The Defendant should not now be permitted to speculate out of the rise of property, after having omitted to take any measures to have the lots bid in for his own on the day of sale.

The order denying his motion was properly affirmed by the Supreme Court, at General Term; and the order of affirmance should here be affirmed, with $10 costs.

Reversed.

JOEL TIFFANY,
State Reporter.

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ZACHARY PECK, APPELLANT, v. WILLIAM MINOT, JR., AND OTHERS, EXECUTORS OF WILLIAM SAWYER, DECEASED, RESPONDENTS.

Bond and Mortgage—Consideration—Findings of Fact—Evidence.

Where a bond and mortgage is given to secure the payment of a specific debt between the parties, and business transactions continue between them, with balances sometimes with the one and sometimes with the other, whether any balances in favor of the mortgagor shall be applied to the payment of the subsisting bond and mortgage is a question of fact depending on the intention of the parties; and unless such intention is expressed or implied from the conduct of the parties, the mortgage lien will continue.

THIS action was commenced by the Plaintiff as the assignee of William H. Brown, since deceased, against R. & G. L. Schuyler, for a settlement of accounts. William Sawyer was also made a Defendant, as being the assignee of a bond and mortgage which were executed on the 11th day of June, 1851, by William H. Brown to the Schuylers, to secure the sum of $16,000, payable one year from date. The complaint alleged the payment of this bond and mortgage, and prayed that the same might be delivered up and cancelled. The suit against the Schuylers has been dis continued, and the questions presented arise upon the mortgage above mentioned. The referee reported in favor of the Defendant.

The judgment, upon his report, was affirmed by the General Term of the Supreme Court of the City of New York, and the Plaintiff now appeals to this Court. The facts are stated in the opinion of the Court.

N. Dane Ellingwood for the Appellant.

S. G. Lyon for the Respondents.

HUNT, J.—The findings of fact by the referee are sustained by the evidence, and are conclusive upon us. We cannot interfere with the results reached by him, although we may be of the opinion that the evidence would have justified a contrary conclusion. The appeal to us is upon the law simply. Upon an affirm-

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ance of judgment, the appeal upon the facts goes no further than to the General Term. There is testimony upon which the referee was justified in his conclusions of fact, and we look no further than to his report. Among others, the referee finds the following facts:

That prior to January 1, 1851, Wm. H. Brown and R. & G. L. Schuyler had dealings with each other for the five years preceding, in borrowing and lending money, checks, and notes, to an amount exceeding $531,000. Between the 7th of January, 1851, and the 4th of June of the same year, such dealings were continual, to a large amount on each side; and on the latter day there was a balance against Brown, on their accounts alone, of $16,000. To secure this balance Brown executed to the Schuylers his bond and mortgage, dated June 11, 1851, conditioned for the payment of $16,000 in one year from its date, with seven per cent. interest. The same kind of transactions continued between the parties until June 3, 1854, and the accounts also included a large amount of expenditures, deeds, and receipts, arising out of the transfer to the Schuylers of the steamers Independence, Seabird, Pacific, and of the accounts of the Daniel Webster. The three first of these vessels were transferred to the Schuylers by Brown, to save trouble to himself, and as being safer in their hands than his own; and the last one of them was purchased by Mr. Vanderbilt while unfinished in Brown's ship-yard. Whether, after the giving of the mortgage in question, there was at any time a balance of accounts, including the $16,000, in favor of Mr. Brown, is a simple question of fact. If such balance at any time existed, then the further question arises, was it the intention of the parties that the mortgage should be paid by such balance, or that it should continue as a subsisting security for the $16,000, independent of any balance in the current accounts? This, also, is a simple question of fact. If it was the intention and agreement of the parties that, as soon as a balance of $16,000 should accrue in favor of Brown, the same should be applied in discharge of the mortgage, then the mortgage was discharged the moment such balance existed. If, on

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the other hand, it was the intention and agreement of the parties that the $16,000 secured by the mortgage should remain as a permanent debt, irrespective of the current balance of accounts, then it would so remain until specifically paid, whatever might be the state of accounts between the parties. Propositions more essentially questions of fact than those thus stated, cannot well be imagined. In response to the latter question the referee finds that there never was any application, nor any intention on either side to make an application, of any accrued balance in Brown's favor in payment of the mortgage; that, on the contrary, this mortgage was given with the intent that it should remain as a security for the original amount, so that moneys subsequently received should not be applied against it, and that it should remain unaffected by subsequent transactions until a final settlement of all accounts should take place.

It is not necessary that a referee should give the reasons upon which he bases his judgment of fact; but in the present case he has done so, and some of the reasons given by him are quite satisfactory. Then the mortgage in question covered three lots in Eighth street, and two lots on Ninth street, in the city of New York.

On the 21st of January, 1853, the Schuylers released to Brown the three lots on Eighth street. This release recited that it was made "to the intent that the lands hereby conveyed may be discharged from the said mortgage, and that the rest of the lands, in the said mortgage specified, may remain to the parties of the first part as heretofore." The release also recited that the Schuylers, at the request of Brown, "have agreed to give up and surrender the lands hereinafter described unto the party of the second part [Brown], and to hold and retain the residue of the mortgaged lands as security for the money remaining due on said mortgage." This document affords evidence that, as late as January, 1853, Brown considered the mortgage to be in full force and effect, while the claim of his counsel is that it had been satisfied long before that period.

Again, on the 11th day of June, 1853, Brown executed and de-

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livered to the Schuylers his four several promissory notes of $560 each; said notes were dated, respectively, December 11, 1851, June 11, 1852, December 11, 1852, June 11, 1853, and were expressed to be "for six months' interest due this day on my bond and mortgage to them for $16,000." These recitals furnish strong evidence that the mortgage was in force, to its full amount, on the 11th of June, 1853, on which day it was transferred to Sawyer, and, as the referee finds, with the knowledge of Brown. The referee concludes his findings on that branch of the case with this statement: "I find, as matter of fact, from the facts above detailed, that he (Brown) treated it on that day (June 11, 1853) as a still subsisting mortgage for the whole principal and interest, and that he and the Schuylers had never applied, and had never intended to apply, any payments that he had made in reduction or payment of the mortgage."

Upon this state of facts the question of how the accounts actually stood, at any time after the giving of the mortgage, is unimportant with reference to that security. The referee, however, on this point finds that, including the steamer accounts, there was no balance in favor of Brown, but a balance against him exceeding the amount of the mortgage.

The counsel for the Appellant urges that when a mortgage is given as security for a pre-existing debt, or for a balance of account, that the mortgage cannot be held as security for any subsequent balance, unless it was expressly so agreed. He also urges that a subsequent verbal understanding that an existing mortgage shall stand as security for another debt, does not create a lien under the mortgage (Townsend *v.* Empire Stone Dressing Co., 6 Duer, 208; Stoddard *v.* Hart, 23 N. Y. R. 556; James *v.* Morey, 2 Cow. R. 292).

The findings of the referee are so full and so explicit against the facts necessary to raise these propositions, that it is not necessary to discuss them. The questions do not arise in the present case. The last point raised by the Appellant's counsel embraces an objection to the evidence of the witness Alofsen. It is said that he should not have been allowed to testify to cer-

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tain daily entries made by him in the course of the business of R. & G. L. Schuyler. The entries were made by the witness in his own handwriting, and, after looking at them, he testified that his memory was refreshed, and that he remembered the transaction. It was placed by the referee upon the distinct ground that, after having examined the entry, the witness remembered the transaction. There can be no doubt of the competency of such evidence.

The objections urged by the Appellant's counsel are mainly to the facts as found by the referee.

In relation to these, as already stated, we do not interfere; and upon legal questions I do not discover that any error has been committed by the referee or the General Term.

Judgment must be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS IN ERROR, v. CHARLES BENNETT, DEFENDANT IN ERROR.

Indictment—Requirement in an—Larceny—Special Property in Agent—Jurors' Challenge—Interest.

The distinction between the *commencement* and the *caption* of an indictment stated by Fullerton, J.

"The Jurors of the People of the State of New York in and for the body of the county of Cortland, upon their oaths present," &c., is a sufficient *commencement.*

A *caption* is no part of the indictment, and is only used when the proceedings are removed from an *inferior* to a *superior* court, by error, &c., and it consists wholly of the history of the proceedings in finding the indictment in the inferior court. Thus the history names the *court* where the indictment was found, the *jurors' names* by whom found, and the *time* and *place* of the finding of the same, with such averments as to show regularity and jurisdiction.

A person employed by the superintendent of the poor in a county to purchase provisions for the poor-house, &c., has neither a *general* nor *special* property in the property thus purchased.

The office of superintendent of the poor is a mere agency of the county, and may be considered as having a special property in provisions purchased for the use of the poor. But the actual property is in the county, and, when stolen, should be laid in the indictment as the property of the county.

THIS cause comes into this Court by writ of error, on the part of the People, from a judgment of the Supreme Court in the Sixth District, reversing a judgment of the Cortland County Sessions, and discharging the Defendant absolutely out of the State prison at Auburn, the conviction having been for a felony.

At the March Term of said Court of Sessions, 1866, the Defendant was indicted for having, on the 12th of that month, within said county of Cortland, feloniously stolen, taken, and carried away a quantity of pork, of the value of one hundred and thirty dollars, of the goods, chattels, and personal property of one Alonzo W. Gates. A second count recited the same transaction, only that it alleged the pork to be the property of the county of Cortland.

After the trial of the indictment had been moved by the District-Attorney, the Defendant's counsel asked the Court to direct the

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District-Attorney to elect upon which count he would try the Defendant. The Court refused so to direct, and the Defendant's counsel excepted.

The counsel for Defendant then interposed a challenge to the array of jurors, on the ground that the jurors, being residents of the county of Cortland, and thus having an interest in the property mentioned in the second count, were disqualified from sitting as jurors on the trial. The Court overruled the challenge, and the counsel for the Defendant excepted. Each separate juror, as called, was challenged on the same ground, but they were admitted to sit, under the like exception.

After the jury had been empanelled and sworn, and the cause opened to the jury by the District-Attorney, the Defendant's counsel moved to quash the indictment, on the grounds:

1st. That it did not appear on the face of the indictment that it was found or presented by a grand jury.

2d. That it did not so appear that it was found and presented by the requisite number of grand jurors.

3d. That it was not alleged that the grand jury were charged and sworn by the Court of Sessions to inquire for the People of the State and for the body of the county.

4th. That it did not appear on the face of the indictment that the same was presented by a grand jury, and at a Court of Sessions legally constituted.

The District-Attorney objected that, after the plea of not guilty, it was too late to move to quash the indictment. The Court denied the motion to quash, and the counsel for the Defendant excepted.

On the trial it appeared that the property was stolen by the Defendant from the wood-house attached to the county poor-house of Cortland county, of which Alonzo W. Gates was the keeper. That Gates was hired for his position by the county superintendent of the poor, by whose directions he (Gates) had purchased the pork, and that he had no interest in the property except as the employé of the superintendent, and that it was for the use of the poor-house. The superintendent ordered Gates to

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buy the pork. Gates did so, getting his note discounted to pay for it, and afterward took up his note by an order of the superintendent on the county treasurer for the amount.

The counsel for the Defendant moved to quash the indictment, and afterward that the Court direct the jury to acquit, on the ground of variance—the proof showing, as he alleged, that the pork was neither the property of Gates nor of the county of Cortland. The Court denied the motions, and the Defendant's counsel duly excepted. The Defendant's counsel requested the Court to charge in substance that, under the testimony, Gates had neither a general nor special property in the pork, and that such property was not in the county, but belonged to the superintendent as a corporation under the statute. To the refusal of the Court so to charge, the counsel for the Defendant excepted.

The Defendant was convicted, and sentenced to five years' confinement in the State prison at Auburn. At a General Term of the Supreme Court of the Sixth District, held in July, 1867, the judgment of the Court of Sessions was reversed, and it was ordered that the Defendant be discharged from imprisonment. From this judgment and order the case comes by writ of error, sued out by the People, into this Court.

John H. Reynolds for Appellant.

A. J. Parker for Respondent.

FULLERTON, J.—After the plea of not guilty had been entered, and the trial moved by the District-Attorney, the counsel for the prisoner made a motion to quash the indictment, because:

1st. It did not appear on the face of the indictment that it was found or presented by a *grand* jury.

2d. Because it did not appear on its face that it was found and presented by the requisite *number* of grand jurors.

3d. Because it was not alleged in the indictment that the grand jury were *charged and sworn* by the Court of Sessions to inquire for the People of the State of New York, and for the body of the county of Cortland.

These and similar objections are frequently made to the form

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of an indictment, and it is therefore proper to consider, in the first place, what constitutes a valid presentment of a grand jury.

We have inherited from England many technical rules relating to criminal practice which have long since become obsolete. They had their origin in that period of English history when the most trivial offence was punishable with death, and when it was almost a foregone conclusion, if the sword of justice was drawn, that it must be returned bathed in blood. It is not to be wondered at that humane Judges should have been found, in such an age, willing to save life by attaching importance to objections, purely technical, to the form of the indictment which placed the accused on trial. An advanced civilization, and a more humane administration of the law, have removed the causes which gave rise to these technical rules, and there is therefore no good reason for retaining them. Ratione cessante, lex ipsa cessat. So thought our legislature when it passed the statute of jeofail, and enacted that no indictment should be deemed invalid by reason of the omission of the Defendant's title or occupation, or by a misstatement of them, or of the town or county of his residence, where the Defendant shall not be prejudiced thereby; or by an omission of the words "with force and arms," or words of similar import, or by an omission to charge any offence to have been committed contrary to a statute, or by reason of any other defect or imperfection in matters of form which shall not tend to the prejudice of the Defendant.

This statute swept away many of the objections to the forms of indictments which, at times, seriously interfered with an effective administration of criminal justice. A more liberal practice began to prevail at an early day in England. Bacon says: "Some indictments have been quashed for an omission of the names of the jurors; and others for want of the words *good and lawful men;* and others for want of the words *and then and there sworn and charged;* and others for want of the words *to inquire for the King and for the body of the county;* yet of late years exceptions of this kind have not been much favored, especially if the indictment were in a superior Court, *and that*

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which is omitted be, in common understanding, implied in what is expressed" (Bacon's Ab. I. Indictment).

This is a sound rule, and one that it is safe to follow. It does not deprive an accused party of a fair trial on the merits, nor does it, on the other hand, open an easy door for an escape on technical grounds. Applying this rule, the form of this indictment should be considered good if the omissions complained of are, in common understanding, implied in that which is expressed.

That part of the indictment which is complained of as defective is as follows:

"Court of Sessions:

"Cortland county, *ss.* The jurors of the People of the State of New York, in and for the body of the county of Cortland, upon their oaths present."

Then follow apt words charging the Defendant with the commission of a larceny. Here are all the requisites of a good commencement to an indictment. It plainly appears to have been found in the Court of Sessions for the county of Cortland, and by the jurors of the people for said county. It is true that it does not allege that it was found by a *grand* jury, or by the legal *number* of grand jurors; but these are plainly implied, because that body, legally constituted, alone have the power to present any one for trial.

This has been frequently decided (McClure *v.* The State, 1 Yerger, 206, per Catron, J.).

The form of this indictment is identical, mutatis mutandis, with that long since adopted in England, and which has obtained in most of the States in our own country.

The form used in England nearly three hundred years ago was, "Ivratores pro domina regina presentant, quod," &c. (West's Symboleography, Part 2, p. 96). And it has been continued without exception to the present day. A great deal of confusion, however, exists in the books, because the distinction between the *commencement* and the caption of an indictment, which has always existed in England, has not uniformly been maintained here. "The whole question as to what the *caption*

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should contain" (says Bishop in his Treatise on Criminal Procedure, § 154) "appears, when approached through the American books, draped in mist and girded about with darkness." Observing the proper distinction between the *caption* and the *commencement* of an indictment, no valid objection will be found to the one in this case. The caption is no part of the indictment. It consists wholly of the history of the proceedings when an indictment is removed from an inferior to a superior Court.

As I have already stated, the form of an indictment, in many of our own States, and which is derived from England, is thus: "The jurors of the People of the State of ———, in and for the body of the county of ———, upon their oath, present," &c. This is the *commencement* and all that it need contain. The caption is quite a different matter, and it had its origin in this way. Where an inferior Court, in obedience to the mandate of the King's Bench, transmitted the indictment to the crown office, it was accompanied with its history, naming the *Court* where it was found, the *jurors' names* by whom found, and the *time and place* where found. All this was entered of record by the clerk of the *superior Court* immediately before the indictment, and was called the *caption;* but it was no part of the indictment itself (Bishop on Cr. Pro., vol. i., §§ 145, 146; 1 Starkie's Cr. Pl., 2d ed. 233). A complete form of the caption is given in 2 Hale's P. C. 165, and in 1 Chitty's Cr. Law, 327.

This same practice prevailed in our State when indictments were removed from the Sessions to the Supreme Court, as will be seen in the case of The People *v.* Guernsey (3 John. Cases, 266), quoted by the Respondent.

It often occurred that these captions were defective in the statement of facts sufficient to show that the inferior Courts, where they were found, had jurisdiction. Then followed a motion in arrest of judgment, and decisions as to the requisites of a caption, viz.: that it should contain an averment that the indictment *to which* it was prefixed was found by a *grand* jury of good and lawful men, giving their names, and that they had been then and

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there sworn and charged, &c., &c. (vide Bishop's Cr. Pro., § 155, vol. i., note 1). The same doctrine is aptly stated in Burns' Justice, vol. iii., p. 372, in these words: "The caption of the indictment is no part of the indictment itself" (2 Hale, 165); "but it is the style, or preamble, or return that is made from an inferior Court to a superior, from whence a certiorari issues to remove; or when the whole record is made up in form; for, whereas the record of the indictment, as it stands upon the file in the Court wherein it is taken, is only thus: *The jurors for our lord the King upon their oath present.*" The difficulty in our practice has grown out of the error of regarding these decisions as furnishing a test of what the indictment itself should contain, rather than its caption, when removed to a superior Court. The consequence is, that in some of the States there have been introduced into the commencement of the indictment the averments necessary to make a good caption, thus confounding the two (Bishop's Cr. Pro., § 149, note 2). This has led to great diversity of practice, and, necessarily, to confusion; and it will be readily seen that the decisions of such States upon these questions have no application here, for the English practice has been adopted in our own State (Barb. Cr. Treatise, 180).

So far, therefore, as the objections in this case go to the form of the indictment, the latter must be considered good. Should an indictment be found in an improper manner, or by an insufficient number of jurors, the way is open for redress by motion, which secures to the accused party immunity from an illegal trial or punishment (State *v.* Batchelor, 15 Misso. 207, 208; Reg. *v.* Heane, 9 Cox Cr. C. 433, 436; 10 Jurist, N. S. 724; 3 Q. B. 238; Bishop's C. P., § 448).

I pass to the consideration of the other questions arising in this case.

To constitute a good indictment for larceny, the thing stolen must be charged to be the property of the *actual owner*, or of a person having a special property as *bailee*, and from whose possession it was stolen (2 Arch. C. P., 7th ed. 257). Gates was neither the actual owner nor the bailee of the property stolen, and the

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first count in the indictment is therefore bad. He was employed by the county superintendent of the poor of Cortland county at a salary. The last-named officer is clothed by statute with the power "to employ suitable persons to be *keepers* of the poor-houses" (2 R. S., 5th ed. 841, § 34). And it was under this power that Gates was employed. The superintendent is, by the same statute, authorized "to purchase materials" for the support of the paupers.

It is true that, in this instance, the keeper purchased the property stolen with his own money; but it was an advance made for the superintendent, and he was by him subsequently, and before the larceny, reimbursed.

Neither was Gates in the actual possession of the property so as to have a *special* property therein. The character of his possession depends upon the tenure by which he held the property. If he were the mere servant of the actual owner, the possession was in such owner, not in him. If he were the servant, then the distinction between the *charge* and the *possession* of the property must not be overlooked. This distinction, though in ordinary language lost sight of, is necessary to be observed in dealing with the question under consideration.

Whilst no man is so high as to be above the reach of the law, no one is so low as to be beneath its protection. It is necessary, therefore, that we should observe critical distinctions in charging a man with a crime, lest his life or liberty be twice placed in jeopardy. And such a case might arise if the Defendant were again indicted for the same larceny, alleging the property to be in the *master*. Whilst, therefore, in the popular use of the terms, the servant is said to be in *possession* of the master's property, yet, in contemplation of law, he has the charge only. In this case, Gates could have been removed at the mere caprice of the superintendent, and his possession of the property was not such that he could have maintained a civil action for it against the thief. Indeed, if *he* had taken the property in the manner and with the design with which the thief did, he could have been convicted of a larceny (Coats *v.* The People, 4 Parker, 662).

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Chitty thus states the rule: "It is a clear maxim of the common law, that where one has only the bare charge or custody of the goods of another, the legal possession remains in the owner, and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use. Thus, a butler may commit larceny of plate in his custody, or a shepherd of sheep. The same of a servant intrusted to sell goods in a shop. This rule appears to hold universally in the case of servants, whose possession of their master's goods, by their delivery or permission, is the possession of the master himself" (vide 1 Denio, 123, and cases there cited).

Adopting this as the rule, what practical distinction can be drawn between the relations which the butler, the shepherd, and the servant intrusted to sell goods, bear to their respective masters, and that which Gates bore to the superintendent who employed him? The position, therefore, that as a mere servant the possession of Gates was sufficient to support the allegation in the indictment cannot be maintained (Dillenback *v.* Jerome, 7 Cow. 294; Commonwealth *v.* Morse, 14 Mass. 217).

There is another class of cases involving the possession of property, much relied upon on the argument, which it is necessary to notice. They are cases where the question arose as between *master* and *servant*, where the servant was indicted for stealing from the master, and where the property stolen, though received by the servant *for* the master's use, had never *actually* passed from the latter to the former. The rule in such a case is, "that if the servant have done no act to determine his original, lawful, and exclusive possession, as by depositing the goods in his master's house, or the like, although to many purposes, and as against third persons, this is in law a receipt of the goods by the master, yet it has been ruled otherwise in respect of the servant himself, upon a charge of *larceny* at common law, in converting such goods to his own use" (2 Russ. on Crimes, 401, 4th ed.; 2 East's P. C. 568). This rule has no application to the case under consideration.

In the second count the property was alleged to be in the county of Cortland, and it is argued that it is bad for that reason.

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It is claimed that the property was vested in the superintendent of the poor as a body corporate, and that, even if it were the property of the county, such property should have been alleged to be in the Board of Supervisors. To establish this latter proposition, the act is quoted which provides that "all acts and proceedings by or against a county in its corporate capacity shall be in the name of the Board of Supervisors of such county" (1 R. S., 5th ed. 846, § 3). Notwithstanding this statute, the Board of Supervisors as such possess no corporate powers (Brady v. The Supervisors of New York, 2 Sand. S. C. R. 460). The county is made a corporation by statute (1 R. S., 5th ed. 846, § 1; Brady v. Supervisors, supra); and amongst its corporate powers is the right to purchase and hold such personal property as may be necessary to execute its corporate or administrative powers (§ 1, subd. 3). The statute designating the name in which legal proceedings by and against the county should be conducted was designed to simplify and lessen the expenses of litigation, and not to change the title of the corporation or the name in which the property should be held.

Instances of similar legislation are not wanting. Actions by and against banks, formed under the general banking law, may be by or against the president thereof (2 R. S., 5th ed. p. 560, §§ 194, 195). And a joint-stock company or association may sue and be sued in the name of its president or treasurer for the time being (3 R. S., 5th ed. 777).

But it is contended that the title to the property stolen was vested in the superintendent of the poor, as a corporate body, he having purchased the same in his name for county purposes, and that it should have been so laid in the indictment. This position cannot be maintained. The office of superintendent of the poor, although invested with corporate powers, is a mere agency of the county. The person who fills the office is required to give a bond to the supervisors for the faithful discharge of his duty, and is authorized to draw, from time to time, on the county treasurer, for all necessary expenses incurred in the discharge of his trust. This creates the relation of principal and agent, and in no sense can the prop-

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erty bought by this officer be regarded as his. Considering, however, the nature of his office, he might be regarded as having a special property in the things stolen, so as to have made it proper to allege the property as belonging to him; but, at all events, it was the property of the county of Cortland, and it was proper so to charge it.

My conclusion, therefore, is that the second count of the indictment is good, and that the judgment should be reversed.

Concurring: PORTER, WRIGHT, BOCKES, GROVER, JJ., and DAVIES, Ch.J.

DAVIES, CH.J.—The Defendant in error was indicted in the Cortland Sessions for grand larceny, in stealing from the county poor-house a quantity of hams, which had been procured for the support of the poor of the county.

The indictment contained two counts. The first count alleged the property taken to be that of Alonzo W. Gates, who, at the time of the larceny, was the keeper of the county poor-house, and had the custody and charge of the property there, and had, in fact, purchased these identical hams with his own money, by the direction of the superintendent of the poor of the county.

Before the larceny he had been reimbursed by a draft on the county treasurer of that county, which had been paid.

The second count of the indictment alleged the hams to be the property of the county of Cortland.

The Defendant was found guilty as charged in the indictment, and was sentenced to imprisonment in the State prison for the term of five years.

Upon a writ of error brought to the Supreme Court, that Court reversed the judgment and conviction, and ordered the discharge of the prisoner upon the ground that the property taken was that of Benjamin, the county superintendent of the poor, and that it was erroneous to charge in the indictment that the same was the property of Gates. The people bring their writ of error to this Court.

It is now insisted on the part of the prisoner that the possession

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by Gates of the property taken was not of such a character as authorized the averment in the indictment that it was the property of Gates. It is undeniable that in an indictment for larceny it is essential that the pleader should aver the title or ownership in the property stolen to be in the true owner, if known; and if not known, then it should be averred that the owner was to the jurors unknown.

This is a general rule in criminal pleading, and, in applying it, it has been held that the owner was one who had a general or special property in the thing taken. In the present instance, Gates had purchased the property taken with his own money, and he had, at the time of the theft, as keeper of the county poor-house, the actual possession and control of the stolen property. After the purchase by him, and before the larceny, he had been reimbursed the amount of his expenditure, by a draft on the county treasurer of the county of Cortland, and on payment of which, out of the funds of the county, it would seem to be clear that the hams stolen became the property of the county of Cortland. I cannot find any warrant for saying that the same was the property of Benjamin, the superintendent of the poor of that county; neither can I assent to the position that Gates, the keeper of the county poor-house, was the servant of Benjamin, the superintendent. If a servant at all, he surely was that of the county, whose agent he was, and the circumstance that the superintendent was the source of his appointment did not make him the servant of that officer. The latter was, in fact, but the agent or servant of the county, and whatever he did as such was done for and in behalf of the county of Cortland. As well might it be said that the numerous officers throughout the State authorized to be appointed by the Governor, by his appointment of them become thereby his servants, instead of, as they are in truth, in common with the Governor himself, the agents and servants of the people of the State.

The absolute owner of the property stolen must, therefore, be held to be that of the county of Cortland, whose money was taken and applied for the purchase thereof. The question then arises

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whether the averment in the indictment, that the ownership was in Gates, the agent or servant of the county, who had the actual possession and control of the property at the time of the larceny, was not itself sufficient. The cases abundantly sustain the position that an averment of ownership in the person having the actual possession and control of the thing stolen, at the time of the theft, is all that is required.

In a modern case in England, where a stage-coach had been robbed of a box containing a variety of articles, it became material to determine whether the goods so stolen could be laid as the property of the coachman. There were three counts in the indictment; but one of them, which laid the property in the coach proprietors, failed, on account of a variation; another, which laid the property in persons unknown, was rejected by the Court as improper; and the case, therefore, necessarily proceeded upon the remaining count, which laid the property in the coachman.

It appeared in evidence that the box was delivered by the servant of a tradesman in London to the book-keeper at the inn from which the coach set off, who called it over amongst other things in the way-bill, and he delivered it to a porter, who put it into the coach; and that the coachman, in whom the property was laid, drove the coach to a place about thirty-eight miles from London, during which journey the box was stolen from the coach by the prisoner. It also appeared that the proprietors of the coach never called upon the coachman to make good for any loss, except when it happened by his neglect, and that for goods stolen privately from the coach they never expected any compensation from the driver. The jury having found the prisoner guilty, the case was stated for the consideration of the judges, and after it had been ably argued, and much considered, a majority of the judges were of opinion that the property was well laid to be in the driver. Hotham, B., who delivered the opinion, said "that the material question was whether the driver had the possession of the goods, or only the bare charge of them, but that the case was not open to that distinction; for although as against his employers, the masters of the coach, the mere driver can only have the bare charge of the prop-

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erty committed to him, and not the legal possession of it, which remains in the coach-master, yet, as against all the rest of the world, he must be considered to have such a special property therein as will support a Court in charging them as his goods; for he had, in fact, *the possession and control of them*, and they are intrusted to his custody and disposal during the journey. . . That the law, therefore, on an indictment against the driver of a stage-coach, or on the prosecution of the proprietors, considers the driver to have the bare charge of the goods belonging to the coach; but, on a charge against any other person for taking them tortiously out of the driver's custody, he must be considered as the possessor, and therefore it was well said that he was the owner" (Rex v. Deakin & Smith, O. B. 1800; 2 Leach, 862, 876; 2 East's Cr. L., ch. 16, § 90, p. 653).

In the case of Regina v. Rudick (8 Car. and P. 237), Busby was the servant of Webb, and was sent out by his master to receive money for him from his customers, and he was robbed of such money before it reached his master, on his way home. In the indictment the property was laid as that of Webb; and prisoner's counsel contended that it could not be laid as the property of Webb, as it had never reached his hands, except by the possession of his servant.

Mr. Baron Alderson was inclined to think the money could not be laid as the money of the master, but, as the grand jury was in session, recommended that a new indictment be found, which was immediately done, which laid the money, in one count, as the property of Busby, the servant, and in the other as the property of Webb, and on this indictment the prisoner was convicted. In Regina v. Bird (9 Car. and P. 44) it was held that it was well laid in the indictment that the property stolen was that of one Miers, although he had only the possession of it, one Keyzor being the actual owner. "Whenever a person has a special property in a thing, or holds it in trust for another, the property may be laid in either (21 Maine, 586; 22 Maine, 171; 4 Car. and P. 391; 8 Texas, 115); as for instance, goods left at an inn (2 East's P. C. 658), or entrusted to one for safe-keeping (1 Leach, 356; Rex v. Statham,

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ib.), or cloth left with a tailor, or linen with a laundress" (Wharton's Cr. Law, vol. ii., §§ 1824, 1830).

In Owen v. State (6 Humph. 330), a horse got loose from his owner, Booth, and was taken in the field of Edmondson, and was placed in his stable, from whence it was stolen.

It was held that the property was well laid in Booth, the owner, and also in Edmondson, the temporary possessor; that the horse was in the constructive possession of the owner, and in the actual possession of Edmondson, and that the indictment might well allege the property to be in the owner, or in the third person in whose possession it was at the time of the larceny; and it was also held that a general finding of the jury, on both counts of the indictment, was well sustained by the proof, and the conviction legal and regular.

But the principle of these cases has been recognized and affirmed by the Courts of this State.

In Ward v. The People (3 Hill, 395), the prisoner was indicted and convicted of stealing property from one Flagg, and the indictment averred that the property stolen was the property of Flagg. It in truth was the property of another, and Flagg had himself stolen it from the true owner. Flagg was asked on the trial if he had not stolen the butter. The Court, in its opinion, says: "If the question had been answered in the affirmative the fact would have been immaterial, because possession of property in the thief is sufficient to make it the subject of larceny; and the title may be laid either in the owner or in the thief." This case was taken to the Court for the Correction of Errors, and the judgment of the Supreme Court there affirmed (6 Hill, 144). Senator Foster read an opinion combating the views of the Supreme Court, that possession of the thing stolen was sufficient to authorize an averment of ownership in the possessor; but his views received only the assent of five senators, who voted for reversal, and fourteen members of the Court voted for the affirmance of the judgment. We are authorized, therefore, to assume from these cases, that Gates having the actual possession of the goods stolen, it was well laid in the indictment that he was

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the owner thereof. That if there could be any doubt on that subject, the county of Cortland must be considered to have been the true owner of the property; and that a conviction upon an indictment containing two counts, one of which laid the ownership in the actual possessor of the goods stolen, and the other in the true owner, is good, and should be sustained.

There remains to be considered some other objections urged by the prisoner's counsel. The prisoner's counsel challenged the array of jurors, on the ground that the property stolen, being alleged in the second count to be that of the county of Cortland, the jurors, being inhabitants of said county, were interested, and therefore disqualified to act as such. This challenge assumes that the property stolen was the property of the county of Cortland. This assumption we deem to be correct. But in our judgment this fact furnishes no ground of disqualification of a juror, being an inhabitant of that county, to sit on an indictment of the thief. Can it be seriously urged that, if the State Capitol is fired by an incendiary, that all the inhabitants of the State are disqualified to sit as jurors on his trial, because the building destroyed is the property of the State, and all the inhabitants of the State are interested in the property of the State? The statement of the proposition carries with it its own refutation. The Court properly overlooked the challenge. We think there was no reason for quashing the indictment upon the ground suggested.

The indictment showed, upon its face, that it was presented in the Court of Sessions of Cortland county, by the jurors of the People of the State of New York, in and for the body of that county, and that they presented the same upon their oath.

We think this indictment is in the usual and approved form, and contains all the requirements of the statute.

It is also claimed that the Judge erred at the trial in refusing to charge the jury, in the language of Mr. Justin, that "in cases of felony confessions are regarded as the weakest and most suspicious of all testimony; liable to be obtained by artifice, false hopes, promises of favor, or menaces; seldom remembered accu-

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rately, or reported with precision, and incapable in their nature of being disproved by other negative evidence" (4 Black. Com. 357).

It is to be observed, in the first place, that Blackstone uses this language in connection with his criticisms upon State trials for treason in England; and, although he intends his observations to have a general application to all cases of felony, he regarded them as primarily to be considered in State trials for treason. But the annotator, upon this text of Blackstone, thus remarks, in a note: "It seems to be now clearly established that a free and voluntary confession by a person accused of an offence, whether made before his apprehension or after, whether on a judicial examination or after commitment, whether reduced to writing or not—in short, that any voluntary confession, made by a prisoner to any person, at any time or place, is strong evidence against him; and, if satisfactorily proved, sufficient to convict without any corroborating circumstances. But the confession must be voluntary, not obtained by improper influence, nor drawn from the prisoner by means of a threat or promise; for, however slight the promise or threat may have been, a confession so obtained cannot be received in evidence, on account of the uncertainty and doubt whether it was not made rather from a motive of fear or of interest than from a sense of guilt" (citing Phil. Ev. 86).

Such undoubtedly is the rule, as enunciated by the most authoritative text-writers. Burrill on Circumstantial Evidence, says: "Confessions of this kind, when deliberately and voluntarily made, are jointly regarded as constituting the highest and most satisfactory species of evidence that can be presented before a tribunal" (citing numerous authorities). Greenl. upon Evidence (vol. i., § 214), while sanctioning this doctrine, very properly observes that "the evidence of verbal confessions of guilt is to be received with great caution." And he adds, in § 215: "Subject to these cautions, in receiving and weighing them, it is generally agreed that deliberate confessions of guilt are among the most effectual proofs in the law. The degree of credit due to them is to be estimated by the jury, under the circumstances of each case." In Coon v. The State (13 S. M. & M. 246;

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McCann *v.* The State, ib. 471), the learned author says: "A free and voluntary confession of guilt made by a prisoner, whether in the course of conversation with private individuals, or under examination before a magistrate, is admissible in evidence as the highest and most satisfactory proof, because it is fairly presumed that no man would make such a confession against himself if the facts confessed were not true." He adds in a note: "Mr. J. Blackstone and Mr. J. Foster entertained a different opinion;" and then quotes from 4 Black. 357, and from Mr. J. Foster, and further says: "And the highest authorities have now established that a confession, if duly made and satisfactorily proved, is sufficient alone to warrant a conviction, without any corroborating evidence aliunde," citing numerous authorities (2 Russ. on Cr., p. 824).

The Court committed no error, therefore, in refusing to charge the jury in the language requested.

In view of these considerations, the judgment of the Supreme Court should be reversed, and the judgment of the Court of Sessions of Cortland county be affirmed; and the recordis remitted to the Supreme Court to proceed therein according to law.

Reversed.

JOEL TIFFANY,
State Reporter.

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JAMES B. CLEMENS v. JAMES CLEMENS, JR.

Partition—Jurisdiction—Chancery Practice—Res adjudicata—Statute of Uses and Trusts—Motion to compel Purchaser to take title.

A judgment in partition is binding upon the parties, if the Court had jurisdiction of them, and of the subject-matter of the action.

The Supreme Court is one of general jurisdiction in law and equity, and has jurisdiction of all actions for partition, and it is its proper province to decide whether a partition or sale of the property is most advantageous, &c.

Where, in such action for partition, all persons interested were made parties, and the Court adjudged that partition should be made by a sale of the property, and in pursuance of such order the property has been sold, no party to the action can object to the title of the purchaser under such proceedings, so long as the judgment of the Court remains in force.

APPEAL by Isaac P. Martin, a purchaser of a portion of the premises sold by virtue of the judgment in this action, from an order made at Special Term, and affirmed at General Term, directing him to complete his purchase.

Aug. F. Smith for Appellant.
M. S. Bidwell for Respondent.

DAVIES, CH.J.—John Mullanphy resided at St. Louis, in the State of Missouri, and made and published there his last will, dated February 27, 1830, to which were added three codicils, the last being dated November 23, 1831. The said John Mullanphy died at St Louis, August 29, 1833, seized of certain real estate located in the city of New York. He left him surviving Elizabeth Mullanphy, his widow, and a son, Bryan Mullanphy, and six daughters, namely, Octavia, then the wife of Dennis Delaney; Eliza, wife of James Clemens, Jr.; Jane, wife of Charles Chambers; Catharine, wife of Richard Graham; Ann Biddle, widow of Thomas Biddle; Mary, afterward the wife of Gen. William S. Harney.

On the 7th day of August, 1840, a bill was filed in the Court of Chancery of the State of New York, for the partition or sale of certain lands whereof the said John Mullanphy died seized, including the lands purchased by the Appellant, at the sale hereafter mentioned; and in said bill Elizabeth Mullanphy, Bryan

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Mullanphy, Dennis Delaney and Octavia his wife, and James Clemens, Jr., and Eliza his wife, were the complainants, and Charles Chambers and Jane his wife, Richard Graham and Catharine his wife, Ann Biddle, William S. Harney and Mary his wife, John O. Fallon, one of the executors named in the will of said John Mullanphy (Thomas Biddle, one of the other executors, having died before the said testator, and George Collier, the other and third executor, having renounced the said executorship and declined to act as such or as trustee under said will), and Ellen Chambers, John Chambers, Owen Chambers, Margaret Chambers, Jane Chambers, Jr., Eliza Chambers, Ann Chambers, Mary Chambers, Thomas Chambers, and Bartholomew Chambers, all children of the said Jane Chambers, were the Defendants.

The said bill was verified, July 10, 1840, and contained the following among other averments, in substance: That the complainant Elizabeth Mullanphy was the widow, and the complainants Octavia Delaney and Eliza Clemens were two of the daughters, and the complainant Bryan Mullanphy was the son of John Mullanphy, late of St. Louis, Missouri, deceased.

That the said John Mullanphy died at St. Louis, August 29, 1833, seized of certain lands in the city of New York, whereof partition or sale was sought by said bill of complaint.

That the said John Mullanphy left him surviving four other daughters, namely, the Defendants, Jane Chambers, Catharine Graham, Ann Biddle, and Mary Mullanphy, afterward Mary Harney, which said six daughters and sons were, at the time of the death of said John Mullanphy, and still were, *his sole heirs-at-law*, and as such were severally seized of the said lands, as tenants in common, each to one undivided seventh of said lands, but subject to the right of dower of the complainant Elizabeth Mullanphy. It also stated, "that upon the death of the said John Mullanphy, certain paper writings were produced, which were alleged to be his last will and testament, and three several codicils thereto; which papers, so far as they purported to be the last will and testament of the said John Mullanphy, and the two first codicils thereto, shortly thereafter were lost, mislaid, or destroyed, and have

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never since been produced or found, all of which bore date and purported to have been executed since the first day of January, in the year of our Lord one thousand eight hundred and thirty, and that, thereupon, an attempt was made before the County Court of the county of St. Louis, in the State of Missouri, to establish the said alleged will and the said alleged two first codicils thereto, by the draft, or a certain alleged copy thereof previously taken, which was followed by a long and contested controversy in that Court, which finally decided to reject the said papers, and pronounced in favor of an intestacy; from which decision an appeal was taken, first to the Circuit, and afterward to the Supreme Court of the State of Missouri, by which latter tribunal the said decision of the said County Court was reversed, and the said papers admitted to probate as and for, or as evidence of, the last will, testament, and two first codicils, of the said John Mullanphy, deceased."

That said paper writings so admitted to probate in the State of Missouri were not, by virtue of the proofs there taken, and of the final decision there had, to be regarded as proved within and according to the laws of the State of New York, so as to disinherit the right heirs-at-law of the said John Mullanphy, or to bar their claims as such heirs to their shares in the said lands; and, if the same be set up for that purpose, the same ought to be first duly proved, and established according to the laws and usages of the State of New York. That the complainants were advised and believe that, even should the said paper writings be admitted to probate in this State, the same contain divers bequests, devises, directions, and provisions contrary to the laws of New York, which, or some of which, under the said alleged will and codicils are void. That the complainants did not admit that the said paper writings were legal or competent evidence of the last will and testament and two first codicils of the said John Mullanphy, deceased, or that they were rightfully and properly admitted to probate in Missouri. That the Defendant, John O. Fallon, alone qualified as the executor of the said alleged will, but that he expressly refused and still refuses to assume upon himself the trusts

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therein contained, or any of them; and that George Collier, therein named as the other executor, expressly renounced and refused to qualify or act either as an executor or trustee under the said alleged will; and that the said alleged trusts were without any trustee, and that the title to the said trust estate, so far as it consisted of real estate, had devolved upon and vested in the heirs-at-law of the said John Mullanphy.

That the Defendants Charles Chambers and Jane his wife had, at the time of the death of the said John Mullanphy, eight children living: that is to say, Ellen Chambers, John Chambers, Owen Chambers, Margaret Chambers, Jane Chambers (junior), Eliza Chambers, Ann Chambers, and Mary Chambers; and that, since the death of the said John Mullanphy, the said Charles Chambers and Jane his wife had two other children, that is to say, Thomas Chambers and Bartholomew Chambers; all of which ten children were living, unmarried, and all of whom were infants, excepting Ellen Chambers, who was of full age.

The following proceedings were had in said Chancery suit:

On the 25th day of August, 1840, an order was made and entered in said suit that all the Defendants therein severally appear and answer the said bill by the 26th day of December then next ensuing, or that the said bill be taken as confessed by them; and that within twenty days from the date of the said order the complainants cause a copy thereof to be published for three months, at least once in each week, successively, in the State paper, and in the New York Commercial Advertiser, a paper printed in the city and county of New York, in which such premises are situated, and which order contains a description of the premises affected by said suit.

The said order was published accordingly. On the 30th day of December, 1840, an order was made and entered in said suit by which the said bill was taken as confessed by all the Defendants.

On the 31st day of December, 1840, an order was made and entered in the said suit, referring it to David Codwise, Esq., one of the masters in Chancery, to take proof of the complainant's title and interest in the said premises, and of the several matters

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set forth in the said bill, and to ascertain and report the rights and interests of the several parties in the said premises.

By his report, dated the 17th day of April, 1841, the said master reported that the matters set forth in the said bill were found by him to be substantially true, as set forth in the said bill, and that the said seven children of John Mullanphy, deceased, were each seized of one undivided seventh part of the said premises, subject to the dower-right therein of the Complainant Elizabeth Mullanphy.

On the 29th day of April, 1841, a decree was made and entered in the said suit by which it was ordered, adjudged, declared, determined, and decreed, in substance, that the said report be, and the same was, thereby ratified, approved, and confirmed. It was also decreed that the seven children of John Mullanphy, deceased, above named, were each seized and entitled to the one equal undivided seventh part of the said lands, described in the said bill, with the appurtenances, subject to the dower and rights therein of the Complainant, Elizabeth Mullanphy. That the Defendants, John O. Fallon, Ellen Chambers, John Chambers, Owen Chambers, Margaret Chambers, Jane Chambers, Jr., Eliza Chambers, Ann Chambers, Mary Chambers, Thomas Chambers, and Bartholomew Chambers, were not, nor were any or either of them seized of or entitled to any share or interest in the said lands, or any part thereof, as tenants in common or otherwise.

That the said lands described in the said bill should be sold at public auction, and that the proceeds thereof be divided among the several parties entitled thereto, according to the provisions of the said decree.

Afterward, and on the 11th day of June, 1847, a bill of revivor and supplement was filed in said suit, in which bill (which was verified on the 26th day of May, 1847) James Clemens, Jr., and Eliza his wife, were the complainants, and Bryan Mullanphy, Octavia Delaney, Charles Chambers and Jane his wife, Richard Graham and Catharine his wife, William S. Harney and Mary his wife, Louis G. Picot, Ann B. Harney, Eliza Harney, and John Harney, infant children of Mary Harney, were Defendants.

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The said bill of revivor contained the following among other averments, in substance: That since the said decree was obtained, the said Elizabeth Mullanphy and Dennis Delaney, two of the complainants named in the said original bill, and Ann Biddle, one of the Defendants named therein, had died, and that in consequence thereof the said decree and all the other proceedings had upon the said original bill had become and were abated.

That the dower-estate in the said lands of the said Elizabeth Mullanphy had terminated by her death. That by the death of the said Dennis Delaney the title to one-seventh of the said lands had become vested exclusively in his widow, the said Octavia Delaney. That the said Ann Biddle left a last will and testament, dated January 2, 1845, which will was, on the 14th day of January, 1846, duly admitted to probate by and before the Probate Court of St. Louis, Missouri, and that the same corresponded and conformed to the statute laws of New York as to the manner of its execution and publication; and that in and by the said will the said Ann Biddle devised all her right, title, and interest in the said lands to the Defendant, Louis G. Picot, in trust, to have and to hold the same to the use of the Defendant Mary Harney, during her natural life, and after her death to the use of all and every the child or children of the said Mary Harney then living, and of the issue of all and every of such child or children that might have died, and of the heirs and assigns of such child or children and issue forever.

That the said Mary Harney had, at the time of the death of the said Ann Biddle, and at the time of the verification of said bill of revivor, three children—that is to say, the Defendants, Ann B. Harney, Eliza Harney, and John Harney, who constituted her only issue then living, each of whom was a minor. On the 26th day of May, 1848, an order was made and entered in said suit appointing the clerk of the city and county of New York guardian ad litem of the infant Defendants, Ann B. Harney, Eliza Harney, and John Harney.

Pending the proceedings on the said bill of revivor, the Defendant Octavia Delaney intermarried with Henry Boyce, and

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on the 22d day of October, 1849, an order was made and entered in said suit, that the same stand and proceed against the said Boyce and wife, and that the Plaintiffs amend their proceedings by adding the names of the said Henry Boyce and Octavia his wife.

On the 4th day of May, 1850, an order was made and entered in the said suit, referring it to Aaron Vanderpool, Esq., to take proof of the several matters set forth in the said bill of revivor; and by his report, dated January, 1851, the said referee reported that the said several matters were true as therein stated.

On the 1st day of April, 1851, a decree was made and entered in said suit, by which it was ordered, adjudged, and decreed that the said report stand confirmed, that a portion of the said premises be sold, and that a portion thereof, including the lands affected by this proceeding, be partitioned among the heirs of the said John Mullanphy. By an order made and entered on the 16th day of August, 1851, Aaron Vanderpool, Daniel P. Ingraham, and John Cochrane, Esqs., were appointed commissioners to make partition of said lands.

By the report of the said commissioners, dated the 22d day of November, 1851, it appears that the said commissioners made actual partition of the said premises among the several heirs of the said John Mullanphy, as adjudicated by the said Court to be entitled thereto, according to their respective estates, rights, and interests therein, as claimed in said suit, and in the said proceedings upon said bill of revivor; and said commissioners partitioned to and set apart in severalty to the said Plaintiffs, James Clemens, Jr., and Eliza his wife (in the right of the said Eliza) a certain portion of the said premises, which portion included the premises affected by and in question in the present proceedings.

On the —— day of November, 1851, a judgment was made and entered in said action, by which it was ordered, adjudged, and decreed, among other things, in substance:

That the said report of the said commissioners in partition, and all things therein contained, should be ratified and confirmed; and the said partition so made by the said commissioners should

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be final and absolute as to all and singular the parties to said suit, and to those claiming, or to claim from, through, or under them, subsequent to the commencement thereof; and that each of the parties to said suit, to whom shares or portions of said premises had been by said commissioners set apart in severalty, should have, hold, and possess such shares or portions free, clear, and discharged from all claim, right, estate, or interest therein from any other or others of such parties.

The said Bryan Mullanphy, one of the complainants therein, died on the 15th day of June, 1851, after the entry of the interlocutory judgment or decree in said suit settling and determining the interests of the seven children of the said John Mullanphy, deceased, of, in, and to said premises, to be that each of them was entitled to an undivided seventh part therein, and, as we may infer from the paper used on this motion, unmarried and without issue. He left a last will and testament, and codicil thereto, executed by him in 1849 and 1850, he then residing at St. Louis, Missouri. The said instruments were duly proved and admitted to probate in St. Louis, as and for the last will and testament, and codicil thereto, of said Bryan Mullanphy, deceased. The said will and codicil were duly executed and published in the said State of Missouri, in accordance with the laws of that State and those of the State of New York. By said will the said Bryan Mullanphy did declare as follows: "One equal undivided third of all my property, real and personal and mixed, I leave to the city of St. Louis, in the State of Missouri, in trust, to be and constitute a fund to furnish relief to all poor emigrants and travellers coming to St. Louis, on their way bonâ fide to settle in the West." This is the only disposition of any property made by the will, and the codicil contains only a legacy of one thousand dollars.

This action was commenced on the 29th day of October, 1863, for a partition of the lands set off and partitioned to James Clemens, Jr., and Eliza his wife, in the suit commenced in the Court of Chancery, on the 7th day of August, 1840, and which were partitioned and set off to the said James Clemens, Jr., and his

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wife Eliza, in the right of said Eliza. The said Eliza having in the meanwhile died intestate, and leaving her surviving her said husband, James Clemens, Jr., and three sons, namely, James B. Clemens, Bryan M. Clemens, and Jeremiah M. Clemens, and two daughters, namely, Helen J. Clemens, and Alice B. Clemens, her sole heirs-at-law, this action was instituted by the said James B. Clemens, as Plaintiff, making all other persons interested in the real estate of said Eliza Clemens, deceased, parties Defendant thereto. On the 6th day of June, 1864, a judgment was duly entered in said action, wherein and whereby it was ordered, adjudged, and decreed, that the premises described in the complaint therein should be sold by or under the direction of the referee therein named, and on the 4th day of April, 1865, that said premises were sold, and Isaac P. Martin, the Appellant herein, became the purchaser of nine lots, at such sale, for the aggregate sum of $27,150, he being the highest bidder therefor. The said purchaser signed the usual terms of sale, whereby he agreed to pay said sum for said lots, and take and accept the referee's deed therefor.

The said purchaser subsequently refused to complete said sale, alleging and claiming that said referee's deed would not convey to him a good and perfect title to the said premises so purchased by him. The Supreme Court at Special Term made an order compelling and directing said purchaser to complete his title, and on appeal the said order was affirmed by the General Term, and the purchaser now appeals to this Court.

The question which lies at the foundation of the title to the premises which the Appellant purchased at the sale, pursuant to the judgment in this action, is, did John Mullanphy die intestate as to the real estate possessed by him, situated within this State? If he thus died intestate, so that such real estate descended to his heirs-at-law, it will not be difficult to demonstrate that the referee's deed will convey a good title to the premises purchased by the Appellant.

It certainly cannot be of any moment how the fact of intestacy may be established. Whatever road we take to arrive at that

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result, the effect is the same, and the consequence produced is identical. The facts disclosed in the motion papers show that there are three modes or processes by and through which that result may be reached.

1. By an adjudication of a competent Court having jurisdiction of the subject-matter and the parties, adjusting and settling the same.

2. By the circumstance that if a will has been made and executed according to the laws of this State, and the same has been lost or destroyed, that it cannot now be established as a lost or destroyed will.

3. If it should appear that the will, a copy whereof is set out in the papers, was made and executed according to the laws of this State, and could be established as a lost or destroyed will—then, if its provisions are such as to make it void according to the laws of this State, it could not be interposed to change the descent as in case of intestacy.

Without expressing any opinion upon the second and third propositions above mentioned, it appears only necessary, to a proper disposition of this motion, to consider the first.

We have seen that a suit was instituted in the Court of Chancery in this State, on the 7th of August, 1840, in which all the children and heirs-at-law of the said John Mullanphy were made parties, either as Complainants or Defendants. In addition, the children of Mrs. Chambers, one of the daughters of John Mullanphy, were also made parties Defendants; and also in addition, John O. Fallon, the sole surviving executor named in the alleged will of the said John Mullanphy. The complaint therein alleged, in substance, that the said John Mullanphy, as to the real estate whereof he died seized, situated within the State of New York, had died intestate, and that the same, upon his death, descended to his said son Bryan, and to his daughters named, parties to said suit; that they were his sole heirs-at-law, and as such were severally seized of the said land as tenants in common, each to one undivided seventh of the said lands.

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Now, all the parties interested in that question were before the Court, or brought before it during the progress of the action, and before final judgment.

1. There were present in Court the son and the six daughters of John Mullanphy, and the husbands of such of the daughters as were married.

2. The ten children of Mrs. Chambers were also made parties Defendants. It is claimed, on the part of the Appellant, that nine of these children being infants, the Court acquired no jurisdiction over them, as no guardian ad litem was appointed to appear for them, to protect their interests. The second section of the act of April 21st, 1831 (Laws of 1831, chap. 200), which was in force when the partition suit was commenced in August, 1840, authorized the Court of Chancery, on the publication of an order requiring non-resident Defendants, whether minors or of full age, to appear and answer in a partition suit, to make a decree or order for taking the bill of complaint as confessed against all said non-resident Defendants. It has been supposed that the act of April 25, 1833 (Laws of 1833, chap. 227), repealed the act of 1831, and this seems to have been the opinion of the Chancellor in Minor v. Betts (7 Paige, 596). A careful reading of this act shows that its object was to authorize the Chancellor to appoint an officer of the Court guardian ad litem for minors in a partition suit, for whom no suitable or disinterested person shall voluntarily signify his consent in writing to act as such guardian. It does not, in terms, repeal the act of 1831, and, as it does not conflict with the provisions of the latter act, both may be assumed to stand, and both are published by the learned author of the Statutes at Large, as existing statutes at this day (see Edmonds' Statutes at Large, vol. 4, pp. 612, 613). But the youngest of these children must have attained full age more than six years since, and this long acquiescence by them in this decree would now preclude any attempt on their part to set it aside for any irregularity of the kind now pointed out. It will be assumed that if the children of Mrs. Chambers were needful parties to the original partition suit, they were properly made

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such, and the judgment or decree therein effectually disposed of all their interest, if any, in the subject-matter of that suit.

3. If there was any valid will of John Mullanphy in existence, and any legal and valid trusts were created by it, then John O. Fallon (if a trustee under the will) was a proper and necessary party to that suit, as representing those interests. By the alleged will of John Mullanphy, he appointed John O. Fallon, Thomas Biddle, and George Collier the executors of his will. Although he assumed to create trusts by the terms of his will, and evidently intended to name trustees, yet it appears that, in fact, he did not name any, but left the space for their names blank. There were, therefore, no trustees in this will. But, if it is assumed that the testator intended that his executors should be the trustees under the will, and act as such, then, as Biddle had died before the testator, and Collier had distinctly and unequivocally renounced in writing and declined to act as executor or trustee—and it also appearing that letters testamentary had been issued by the Court in St. Louis to Fallon alone, and that he alone had taken upon himself the burden of administration of the estate of said John Mullanphy, under said alleged will, the principles settled by this Court in Mead v. Mitchell (17 N. Y. 210) are pertinent to the question as to the effect of Fallon being a party in the Chancery suit. It was there held that, "under our statutes, an actual partition or sale under a judgment in partition is effectual to bar the future contingent interests of persons not in esse, though no notice is published to bring in unknown parties, and though such future owners may take as purchasers under a deed or will, and not as claimants under any of the parties to the action;" and also that, "independent of the statute, contingent remainder-men, or persons to take under an executory devise, who may thereafter come into being, are bound by the judgment as being virtually represented by the parties to the action in whom the trust estate is vested."

4. Upon the death of Ann Biddle, one of the daughters and heirs-at-law of John Mullanphy, her interest in the premises sought to be partitioned in the Chancery suit passed, by her will,

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to the trustee named therein, Louis G. Picot, in trust for Mrs. Harney for life, and after her death to the use of all and every of her child or children. It was proper to do as was done, therefore, to bring in by bill of revivor, as parties Defendant, Picot, the trustee under the will of Mrs. Biddle, and the children of Mrs. Harney, for whom, they being minors, a guardian ad litem was appointed. These minors were regularly and properly before the Court.

5. Mrs. Delaney having married Henry Boyce, he was therefore properly made a party Defendant. Thereupon, on the 29th day of April, 1841, a decree was made adjudging and determining, in substance and effect, that the said John Mullanphy had died intestate as to said real estate whereof partition was sought in said suit, and that the seven children named of the said John Mullanphy were each seized and entitled to one equal undivided seventh part of the said lands described in the said bill; and on the 1st day of April, 1851, a decree was also made and entered in said suit, upon said bill of revivor and supplement, by which it was also ordered and adjudged that the matters stated in said bill of revivor were true. And on the —— day of November, 1851, a final judgment was entered in said action, whereby it was adjudged and decreed that the said report of the commissioners in partition, and all things therein contained, be ratified and confirmed; and that the said partition so made by the said commissioners be final and absolute as to all and singular the parties to that suit, and as to those claiming from, through, or under them subsequent to the commencement thereof, and that each of the said parties to whom shares or portions of said premises had been by said commissioners set apart in severalty, have, hold, and possess such shares or portions free, clear, and discharged from all claim, right, estate, or interest therein from any other or others of said parties.

It is difficult to perceive any substantial reason why this adjudication of the rights of all parties under this will, if it be assumed to be the last will and testament of John Mullanphy, should not be final and conclusive. It is confidently believed

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that none is suggested, and a careful examination of the facts presented, and the principles of law applicable thereto, leave a firm conviction upon the mind that none exist. All persons interested, in being, were parties to the suit, and the proper person to represent those not in esse was also a party. In Blakeley v. Calder (15 N. Y. 617) this Court held that a judgment in partition is binding upon the parties, if the Court had jurisdiction of them and of the subject-matter of the action; and also that the Supreme Court is one of general jurisdiction in law and equity, and has jurisdiction of all actions for partition; that it was its province to decide whether it was a proper one in which to award a partition or a sale, and, if its decision was erroneous, the remedy was by an appeal. As no one but the parties to the action could call in question the purchaser's title, and as they were bound by the judgment, it was held in that case that there was no reason why the sale in that case should not be consummated by compelling the purchaser to take the title. So in the case at bar, all persons interested in the real estate of John Mullanphy were parties to the action in the Court of Chancery, and are bound by the judgment therein. It is thoroughly well settled that matters which have been once determined by judicial authority cannot be again drawn into controversy as between the parties and their privies to the decision (2 Smith's Leading Cases, p. 787, and authorities there cited). "A decree with regard to the personal status of an individual will be equally conclusive with a decision upon a right of property; and hence the appointment or removal of a guardian or administrator, or even the adjudication of a question of descent or pedigree, may be binding, not only in the proceeding in which they take place, but in every other in which the same matter is agitated. It is equally well settled that the mode in which the question is brought before the Court is immaterial, if it be actually decided" (2 Smith's Leading Cases, p. 787, and authorities cited).

But it is urged, on the part of the Appellant upon this argument, that it does not distinctly appear by the judgment in the Chancery suit that the Court adjudged that John Mullanphy died intes-

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tate, or that the will alleged was void. It was not essential, to create an estoppel, that these matters should have been adjudicated in precise terms. It is sufficient that the substance was so decided; and, as already observed, it was thus disposed of by the judgment, in declaring that the real estate whereof the said John Mullanphy died seized descended to his seven children, and that each was seized and entitled to the one equal undivided seventh part of the said lands. It is laid down as well settled that "the estoppel extends beyond what appears on the face of the judgment to every allegation which, having been made on one side, and denied on the other, was at issue and determined in the course of the proceedings" (2 Smith's Leading Cases, p. 787; Outram v. Morewood, 3 East, 346, 355; Stevens v. Hughes, 7 Casey, 381).

The burden of proof is, of course, on those who rely upon the estoppel, and they must show that the matter now in controversy has been already heard and determined. When, however, it is made to appear with sufficient clearness that a transaction has undergone a judicial investigation, the presumption will be irresistible that the judgment covered the whole, so far as it was entire and indivisible, and cannot be overcome except by the clearest proof that no evidence was given as to the fact by the Plaintiff, or that the Defendant failed to take advantage of a defence that might have been made available (Ballance v. Forsyth, 24 How. 183; Harris v. Harris, 36 Barb. 88; Simes v. Zane, 12 Harris, 242; Kilheffer v. Herr, 17 S. and R. 319, 321).

The well-established rule is clearly and well stated by Judge Hogeboom in Harris v. Harris (ubi supra). He says: "The general rule on this subject is well known to be, that a former judgment of the same Court, or of a Court of concurrent jurisdiction, directly upon the point in issue, is, as a plea in bar or as evidence, conclusive between the same parties, or others claiming under them, upon the same matter directly in question in a subsequent action or proceeding." And he adds: "Such judgment or adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided, as incident to or essentially connected with

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the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defence" (citing Bruen v. Hone, 2 Barb. 586; Embury v. Conner, 3 Coms. 511; Haeir v. Baker, 1 Seld. 357; Davis v. Tallcot, 2 Kern. 184; Hayes v. Reese, 34 Barb. 156). This Court said, in Embury v. Conner (supra), that "an allegation on record, upon which issue has been once taken and found, and a judgment has been rendered, is, between the parties taking it and their privies, conclusive, according to the finding thereof, so as to estop the parties respectively from again litigating that fact once so tried and found, whether it is plead in bar or given in evidence."

All the heirs of John Mullanphy are therefore forever estopped by the judgment in the Chancery suit from setting up or claiming that the said John Mullanphy did not die intestate, and that upon his death the real estate whereof he died seized, situated within the State of New York, did not descend to his seven children, as his heirs-at-law, in equal portions or shares. Such being the settled law, Mrs. Clemens, and those claiming under her, are estopped from setting up any other or greater estate or interest in the said real estate of the said John Mullanphy than that partitioned and set off to her by the proceedings and judgments in the said Chancery suit; and each of the other heirs are in like manner, and to the same extent, estopped from setting up or asserting any such claim. It follows that Mrs. Clemens, by the judgment of a Court of competent jurisdiction, in a suit in which all persons interested in the subject-matter of the litigation being parties to the suit, was declared entitled to hold in severalty in fee the portion of the said real estate so partitioned and set off to her, and each of the other heirs of John Mullanphy to hold in the same way the portion partitioned and set off to them, respectively; and their rights as thus declared are res adjudicata. Mrs. Clemens had, therefore, a good title to her portion, and free and clear of all and every claim of each and all the other heirs of said John Mullanphy. The regularity and validity of the judgment in the Chancery suit are assumed, and that such suit did not abate by the death of

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Bryan Mullanphy, one of the complainants therein, before the final judgment.

By an amendment of the Code, passed July 10, 1851, its provisions were made applicable to suits then pending, as to all subsequent proceedings therein; and by section 121, as then passed, it was provided that no action shall abate by the death of a party, if the cause of action survive or continue. It is clearly to be inferred, from the papers used on this motion, that Bryan Mullanphy died unmarried, and without leaving issue, as already observed; and if so, then his five surviving sisters, the daughters of John Mullanphy, would have been his heirs-at-law, provided he left no valid will. This clearly appears by the report of the case of Boyce *v.* City of St. Louis (29 Barb. 650).

That action was commenced by Octavia Boyce, a sister of Bryan Mullanphy, for partition of the lands partitioned and set off to him in the Chancery suit, and of which he died seized, leaving him surviving his five sisters, of whom the Plaintiff was one. The parties to that action, other than the city of St. Louis, were the four surviving sisters of the said Bryan Mullanphy, deceased, and their husbands, and the surviving children of a deceased sister of said Bryan Mullanphy. The city of St. Louis was made a party Defendant, as claiming one equal undivided third part of the real property sought to be partitioned, under the said alleged last will and testament of the said Bryan Mullanphy. The city of St Louis in her answer set up such last will and testament, and a devise and bequest to it of one-third part of the testator's property, real and personal. The substance of this will has already been stated.

The Supreme Court held the will to be void upon two grounds:

1. That a foreign corporation, not authorized by its charter to take and hold real estate, cannot take, by devise, land lying within this State.

2. That the city of St. Louis had not capacity to take real estate for the charitable purpose and intent specified in this will.

It might also have been added that the devise was void as being in contravention of the provisions of the Revised Statutes,

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which had abolished all eases and trusts in real estate within this State, except as authorized and modified thereby (1 Rev. Stat. 727, § 45). The trust created by this will is not one of those authorized by these statutes, and it is now the settled law of this State that charitable uses and trusts are not excepted from the operations of the provisions of this section (Ayres *v.* The Methodist Episcopal Church, 3 Sand. 351; Yates *v.* Yates, 9 Barb. 324; Beekman *v.* The People, 27 id. 272 to 279; McCaughal *v.* Ryan, 27 id. 376; Beekman *v.* Bonsor, 23 N. Y. 298; Downing *v.* Marshall, id. 366; Same *v.* Same, 23 How. Pr. Rep. 4; Levy *v.* Levy, 33 N. Y. 97; Bascom *v.* Albertson, 34 N. Y. 584). We must therefore hold that Bryan Mullanphy died intestate as to his real estate situated within the State of New York, and consequently upon his death the Chancery suit did not abate, as all his interest in the subject-matter of the litigation therein went to and became vested in his five sisters, then parties to that suit. The cause of action, therefore, survived and continued in the other parties to that action.

It is also very apparent, if this adjudication made in the Chancery suit was not interposed, from the facts appearing in these motion papers, that the alleged will of John Mullanphy could never be established in this State as a lost or destroyed will (Harris *v.* Harris, 36 Barb. 88, 95; Schultz *v.* Schultz, 35 N. Y. 653).

It is unnecessary to proceed with the discussion of the question whether, if the said alleged will of John Mullanphy were proved and established as his last will and testament, the said will contains a valid disposition of his real estate within this State, or is wholly void. As already observed, this question has, in effect, been decided in the Chancery suit, when all proper parties were before the Court; and it would be as unseemly as it would be unjust to them, in their absence, and without a hearing on their part, to open that discussion and proceed again to adjudicate that question. It must be regarded now as finally and conclusively settled, that Mrs. Clemens and her husband took their one-seventh part of said estate free and discharged of all trusts assumed to be created by said will, and free and clear of all claim

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or interest therein of any of the other heirs, devisees, or legatees of the said John Mullanphy.

There is no allegation that the proceedings in the present action, for the partition and sale of the said real estate of Mrs. Clemens, have not, in all respects, been regular, nor that all proper persons have not been made parties thereto.

We are of the opinion that the Appellant acquired a good title to the nine lots of land purchased by him at the sale, pursuant to the judgment in the last-mentioned action; and the order of the Supreme Court, compelling him to complete his purchase, should be affirmed, with $10 costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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EUGENE S. BALLIN AND OTHERS, EXECUTORS, &c., APPELLANTS, v. CHARLOTTE B. DILLAYE, IMPLEADED, &c., RESPONDENTS.

Married Women — Separate Estate — Liability — Deficiency on Foreclosure — Contracts—Statutes of 1848 *and* 1849.

The effect of the Married Women's Acts of 1848 and 1849 is not to remove the general disability of married women to bind themselves by their contracts, but to enable them to hold to their separate use, and to convey and devise their real and personal estate as if unmarried, substantially in the manner and to the extent previously authorized by the rules of equity.

The principle is, that under such acts the married woman may charge her separate estate for any debt she may contract on the credit of, or for the benefit of her separate estate.

PARKER, J.—The action in this case was brought to foreclose a mortgage executed by the Defendant, then and now a married woman, and her husband. By stipulation of the parties judgment of foreclosure and sale was entered, leaving the question of the liability of the Defendant upon her bond for the deficiency, if any there should be, to be determined after it was ascertained that such deficiency existed, and the amount of it.

A sale of the mortgaged premises was had, and a deficiency reported of $6,643.73, and interest from February 2, 1864.

The Defendant acquired her title to the premises by purchase upon a previous mortgage-sale in favor of the Merchants' Bank, on the 14th day of November, 1860. At the time of such sale the Plaintiffs held a mortgage, junior to the one on which the premises were sold, upon the same premises, for about $8,000; and on that day the parties entered into the following agreement, viz.:

"I, Charlotte B. Dillaye, by and with the assent of Stephen D. Dillaye, my husband, testified to by his writing herein, do agree with E. S. Ballin and others, executors of Martin Cone, as follows:

"1. I recognize the bond and mortgage held by them as valid.

"2. I agree to pay or secure the same.

"3. As the executors would bid on the property to the extent

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of said mortgage, and it is my wish they should not do so, I agree to secure said mortgage by a new mortgage, to be executed and delivered simultaneously with the filing of the affidavits of sale under the mortgages held by the Merchants' Bank of Syracuse.

"There are certain thirty-two lots not to be embraced in the new mortgage. The property is the Rust farm, and is described in the mortgage to the executors. The property is mortgaged also to the further amount of some $7,000, advanced this day by the executors to extricate the title from embarrassment."

In pursuance of this agreement the bond and mortgage in question in this action were, on the 14th of November, 1860, executed by the Defendant and her husband.

After the report of sale in this action, showing the deficiency, the question of the liability of Mrs. Dillaye for the deficiency came up for trial at Special Term, upon which trial the Plaintiffs put in evidence the judgment-roll in foreclosure; also the said agreement, the bond accompanying the mortgage foreclosed, the report of the sale and deficiency, and the proceedings in foreclosure of the Merchants' Bank mortgages, and offered to prove that the Defendant, Charlotte B. Dillaye, at the time of giving said bond and mortgage, was possessed of a separate estate from her husband of $10,000; to which the counsel for said Defendant objected, and the Court sustained the objection; to which ruling and decision the Plaintiffs' counsel excepted.

The Plaintiffs then offered to show that Mrs. Dillaye sold several lots, which she purchased under the Merchants' Bank foreclosure, and which she had previously contracted away to other parties, the same being left out of the mortgage in question, under the stipulation. To this the Defendant's counsel objected. The objection was sustained, and the Plaintiffs' counsel excepted.

The Court found and decided as follows:

"This action coming on for trial upon the question reserved as to the personal liability of the above-named Charlotte B. Dillaye to pay the deficiency after the sale of the mortgaged premises; and after hearing the proofs and allegations of the respective parties, and

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after hearing counsel, I have come to the conclusion that no judgment can legally be entered up against her for such deficiency. This conclusion is based upon the stipulation of the parties, and the judgment-roll in foreclosure, as to the facts. As a matter of law I hold that a married woman is not personally bound by her agreement to pay the purchase-price of real estate which she purchases for her separate property, although she has a separate estate."

Upon this decision judgment was entered for the Defendant, which, upon appeal to the General Term, was affirmed, and from the judgment of affirmance the Plaintiffs appeal to this Court.

Although the terms of the conclusion of law stated by the Court seem to look only to the personal liability of the Defendant, and not to that of her separate estate, they must be considered as excluding her estate from the liability also; for the case calls for a decision of that question, and that was regarded as the question by the General Term. Besides, if the case shows her estate liable, the decision, in either view, is equally erroneous. The acts of 1848 and 1849, for the more effectual protection of the property of married women, did not remove the general disability of married women to bind themselves by their contracts; but the power conferred by those statutes to hold to their separate use, and to convey and devise, all their real and personal estate, as if unmarried, carried with it the power to charge such estate substantially in the manner and to the extent previously authorized by the rules of equity in respect to separate estates (Yale v. Dederer, 18 N. Y. R. 265; S. C. 22 N. Y. R. 450).

The rule, as recognized and established by the Courts of Equity in this State, is stated by the Chancellor, in Gardner v. Gardner (7 Paige, 112), as follows: "The wife may have a separate estate of her own, which estate is chargeable in equity for any debt she may contract *on the credit of*, *or for the use of* such estate." Again, in the North American Coal Company v. Dyett (7 Paige, 9), the same learned Chancellor says: "The feme covert is, as to her separate estate, considered as a feme sole, *and* may in person, or by her legally authorized agent, bind such

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separate estate with the payment of debts contracted *for the benefit of that estate*, or for her own benefit upon its credit." In Curtis v. Engel (2 Sandf. Ch. R. 287), the complainants filed their bill as creditors of Mrs. Engel, the Defendant, to charge the indebtedness upon her separate estate. The learned Assistant Vice-Chancellor Sandford said: "In order to maintain their suit they must show that the debt was contracted either *for the benefit of her separate estate*, or for her own benefit, upon the credit of the separate estate. Whatever may have been the expressions of Judges on the subject, this is the utmost extent to which the doctrine has been carried by the decisions in this State."

This rule is fully recognized and asserted in Yale v. Dederer (supra), and in White v. McNett (33 N. Y. R. 371).

That the Defendant, in the case at bar, had a separate estate, we may assume, although not in terms found by the Court, both because the stipulation and judgment-roll referred to in the Judge's decision show it, and because of the exclusion of the Plaintiffs' distinct offer to prove it.

Whether the obligation which the Defendant took upon herself, when she executed the bond and mortgage to the Plaintiffs, was, in view of the undisputed facts of the case, for the benefit of her separate estate, in such sense as to make such estate liable, depends upon a legal construction, and is therefore open for consideration in our review of the case.

That the arrangement between these parties, by which the Defendant was, by the aid of the Plaintiffs, enabled to purchase the mortgaged premises, with the additional thirty-two lots, was a transaction with reference to her separate estate, is but a self-evident proposition, for the premises so purchased were either the whole or part and parcel of her separate estate. The bond and mortgage in question were given as a part of that transaction, to enable her to acquire that separate estate; and with reference to that property, at least, it is impossible to deny that the obligation was entered into by her for the benefit of such separate estate.

The estate thus obtained was not the mortgaged premises exclusively, but thirty-two lots in addition, and these, or their pro-

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ceeds, are in themselves a separate estate, *benefited* by the undertaking of the Defendant to pay the money secured by the bond. I do not understand how it can be said that a debt contracted upon the purchase of property which the purchaser takes into possession and enjoys is not a debt contracted for the benefit of the purchaser's estate (3 Allen, 541; 6 id. 300; 7 id. 504; 8 id. 387).

In White *v.* McNett (supra), where the action was against a married woman, with her husband, upon a guaranty executed by her and her husband, contained in the transfer of a mortgage belonging to her, that such mortgage was collectable, it was assumed that, if she had received the proceeds of the sale, she would have been liable.

Moreover, in this case $7,000 of the money secured by the bond and mortgage was advanced by the Plaintiffs to extricate the title "of the property purchased by her from embarrassment." It can scarcely be denied that this money went to benefit her estate, and the debt contracted by her for it was for the benefit of her separate estate.

I have no doubt, therefore, that in the case at bar the obligation which the Defendant took upon herself, by the execution of the bond, was for the benefit of her separate estate, which is therefore chargeable in equity with the payment of the deficiency in question. In such case the liability attaches, not as a specific lien on any particular portion of her estate, but upon the whole of it.

Her separate estate, as a whole, becomes liable for any indebtedness contracted by her for its benefit to any extent, as it was held in North American Coal Company *v.* Dyett (supra, and 20 Wend. 570), where the indebtedness arose for coal furnished to a factory held in trust for Mrs. Dyett, that the rents and profits of a house in New York, a portion of her trust estate, were held liable to be reached for the indebtedness.

(See also 3 Allen, 541; 6 id. 300; 7 id. 504; 8 id. 387.)

The Defendant's counsel insists, however, that the fact that she had a separate estate cannot be considered, because not set up in the complaint, and the Court was and is bound to consider the

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case upon the issue found by the pleadings; and for the reason that the stipulation by which the Plaintiffs were allowed to take judgment for foreclosure and sale, reserving the question of Defendant's liability for the deficiency, requires such restriction. The language of the stipulation, so far as this question is concerned, after stating that this Defendant has appeared and answered, "claiming by her answer that by reason of her coverture she is not legally liable for any deficiency in the sale," and after allowing the Plaintiffs to enter a decree for the sale of the premises, and to take such steps as may be necessary to enforce said claim according to law, proceeds as follows: "And that in case any deficiency arise upon the sale, under the decree of sale to be entered in such case, no judgment shall be entered against said Charlotte B. Dillaye, until such time as the legal question whether she is liable to a judgment against her for such deficiency shall be tried and decided, on the issue so raised by her answer as aforesaid, by this Court."

I do not think this stipulation, by any fair construction of it, confines the Court to any narrower rule or mode of trial than if the same question had been tried in its natural order, without any stipulation. The whole scope of the stipulation is to allow the foreclosure and sale, to which there was no defence, to take place, so that the fact whether any deficiency would occur might be learned before entering upon a trial which might, or might not, as that fact should turn out, be entirely nugatory.

The language, "shall be tried and decided on the issue so raised by her answer as aforesaid," is but the pointing out of the portion of the case which is reserved for trial in the Court that it shall become pertinent to try it in. Such is the natural and obvious construction of the language used, and no inference arises that the trial of that issue is not to be conducted precisely as if the trial were had before the decree of foreclosure and sale. Notwithstanding the stipulation, it was competent to the Court, upon the trial, to allow an amendment of the pleadings, and, inasmuch as the fact that Defendant had a separate estate was relevant and material, and the Plaintiffs made no objection on the ground

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that it was not set up in the complaint, the Defendant must now meet the case as if that fact were proved.

The same is true in regard to the fact offered to be proved, that the thirty-two lots were left out of the mortgage.

It is proper, therefore, to consider the case upon the assumption that the Defendant had a separate estate. Being of the opinion, for the reasons above stated, that such estate is liable for the deficiency in question, I think the judgment appealed from is erroneous and should be reversed, and a new trial granted, costs to abide the suit.

All reverse, except DAVIES, Ch.J.

Reversed.

JOEL TIFFANY,
State Reporter.

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THE PEOPLE v. BARRIE.

Plank-roads—Turnpikes—Powers of Inspectors.

Mr. Cranbur for Appellant.
Mr. Hitchings for Respondent.

GROVER, J. (dissenting).—The Judge upon trial held, as matter of law, that the Defendant was authorized to act as inspector of plank-roads in the county of Kings, and, upon that ground, directed a verdict for the Defendant, to which ruling the counsel for the People excepted. The only question presented to this Court is, whether such ruling was correct. The inquiry as to what authority the Defendant claimed to act under is wholly immaterial here.

It was proved, on the part of the People, that Philip Hamilton and two others, not including the Defendant, were duly appointed inspectors of plank-roads by the Board of Supervisors of Kings County, on the 16th of December, 1850, and that they took the requisite oath, as such, within the time required by law. It was further proved that the Defendant and two others were duly appointed by said board inspectors of turnpikes for said county, April 3, 1863, and that the Defendant duly qualified as such.

The road in question was constructed and operated by a company incorporated pursuant to chap. 210 of the laws of New York (vol. iii., page 549, Edm. ed.). Section 33 of the act provides that in counties in which there shall be any plank or turnpike roads constructed by virtue of the act, there shall be appointed, by the Board of Supervisors, three inspectors of such roads. Section 34 prescribes the powers of such inspectors, which relate exclusively to determining when parts of, or the entire road, is completed according to the act, but confers no power in relation to the condition of the road after such completion.

Section 47 makes applicable to the companies organized under the act various sections of the Revised Statutes, among which are sections 40, 41 of such statutes, and applies the same to all in-

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spectors and officers named therein, so far as the same can be so applied. Section 41 of the Revised Statutes, so applied, provides for making complaint to inspectors that the road is out of repair, and for the action to be taken thereon by the inspector, which may result in ordering the opening of the toll-gates upon the road. In 1847 the legislature passed an act, chap. 45 (3d Edmonds, 566), providing for the appointment in each county in which there was a turnpike road, whose act of incorporation contained no provision to protect the public against taking toll when the road was out of order, of not less than three, nor more than five inspectors of such roads. Section 10 of chap. 250 (page 374) of the laws of 1849, provides that when complaint shall be made to any inspectors of any plank-road or turnpike, the fees of such inspector shall be paid to him by the complainant. It is insisted by the counsel for the Defendant that turnpike roads include all roads upon which gates are authorized to be erected, at which toll is taken, irrespective of the material used in their construction. The language as defined by lexicographers will justify such construction, but as so defined it may be construed to include such roads only as are commonly called turnpikes. The legislature manifestly used it in the latter sense. This appears from various sections of the act, particularly section 10. Section 33 of the act, we have seen, conferred no power upon the inspectors provided by the act to cause the gates to be opened or removed, upon the ground that the road was out of order.

But I think sections 40, 41 of the Revised Statutes, made applicable to the company and officers by section 47, did confer such power upon those officers, and not upon the inspectors of turnpikes. Such is the import of the language used. It confers the powers specified, in the sections applied, upon the officers created by the act, and not upon other officers.

It follows that two classes of inspectors, in counties requiring the same, are to be appointed—one inspectors of turnpikes, and the other inspectors of plank-roads—and that the latter only can act as such upon plank-roads. The Defendant having been appoint-

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ed inspector of turnpikes only, was not authorized to act upon the road in question.

Some evidence was given tending to show that the road in question had ceased to be a plank-road, that *its surface—and* no portion thereof—was at the time covered with plank, but that the road-bed was constructed of other materials. Section 2, chap. 87 of laws of 1854 (3 Edm. Stat. at L. 582), provides that any plank-road or turnpike company within this State, which shall once have laid their road with plank, may thereafter relay the same, or any part thereof, with broken stone, gravel, &c., and shall be entitled to collect the same tolls as under the laws of 1853. This provision authorizes plank-road companies to change their roads from planks to turnpikes, in the sense in which the legislature have used the term turnpike roads. When this change is effected, the road becomes a turnpike road to all intents and purposes, the same as if originally constructed as such, and consequently becomes subject to the official action of inspectors of turnpikes.

As above remarked, evidence was given tending to show that the road in question had thus been changed.

Had this been indisputably established, the direction of the Judge to the jury, to find a verdict for the Defendant, would have been correct; but this question was treated by the learned Judge as immaterial. The evidence of the Plaintiff upon this point may not have been given. The learned Judge held that the Defendant was authorized to inspect plank-roads, by virtue of his office of inspector of turnpikes. This was error, but my brethren are of opinion that this error did not prejudice the Plaintiff, for the reason that in their opinion there was not sufficient evidence tending to show that the Defendant acted or claimed to act as inspector of plank-roads, to render it proper to submit this question to the jury, and that the Defendant was upon this ground entitled to a verdict, and upon this ground the judgment is affirmed.

The judgment was affirmed by all the Judges, except GROVER.

The majority of the Court are of the opinion that Judge

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GROVER is right in his statement of the law, but that he mistakes the facts of the case.

No other opinion in the case.

JOEL TIFFANY,
State Reporter.

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ALEXANDER SPAULDING, RESPONDENT, v. PETER O. STRANG AND GABRIEL FURMAN, JR., APPELLANTS.

General Assignment—Conditional preferences—Composition deed—Coercion—Fraud.

A general assignment of property in trust for the benefit of creditors—to pay, *first*, confidential and accommodation creditors; *secondly*, those creditors who had executed the conditional release, fifty per cent. on their claims; and *thirdly*, the residue of the creditors—is not fraudulent and void as to any class of creditors.

Such a trust, in no sense, operates to hinder or delay creditors in prosecuting their legal remedies against their debtors.

THIS action was commenced in the fall or winter of 1856, to set aside certain assignments for the benefit of creditors made by the firm of Bradner & Furman to the Defendant Strang, together with an agreement between said firm and certain of their creditors, on the ground that such assignments and agreement were fraudulent and void as against the creditors of said firm, and specifically as against the Plaintiff, one of such creditors; and also for an accounting from the assignee, and for other relief.

The complaint alleges that in March, 1855, the Plaintiff recovered a judgment against the assignors for nearly $3,000, and that in the ordinary way he had exhausted his legal remedies to realize the amount of his judgment, but without success; thus putting himself properly in a condition to apply for equitable relief.

About November 16, 1854, the firm offered to their creditors a proposition—in substance that they should, on or before December 1, 1854, accept fifty per cent. of their respective claims in full satisfaction thereof, and that those thus accepting should, in case the firm should be unable to comply with the terms of the proposition, and an assignment should become necessary, be placed in the second class of preferred creditors in such assignment for fifty per cent. of their respective claims.

Upon the basis of this proposition a release substantially in accordance with the proposition was prepared and presented to the creditors, and was executed, under seal, by more than fifty of said creditors, representing an aggregate indebtedness of about $90,000.

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This release bears date November 16, 1854.

The firm failed to comply with the proposition and terms of release, and on the 1st day of December, 1854, the said firm, as such, and the individual members thereof, as to their individual property, made general assignments to the Defendant Strang, in trust, to pay, *first*, their confidential and accommodation creditors; *secondly*, the creditors who had executed the conditional release, fifty per cent. on their claims; and *thirdly*, the residue of the creditors.

The action was tried at Special Term in the city of New York, by Sutherland, J., who found that the assignments and agreement were fraudulent and void as against the Plaintiff and his judgment, and judgment was accordingly, on the 31st of July, 1860, entered in favor of the Plaintiff, directing the payment, by the assignee, of the Plaintiff's claim and costs of the action, out of the trust funds in his hands.

Bradner, one of the firm, had in the progress of the action died, and the suit was continued.

In January, 1861, the Defendants appealed from the judgment of the Special to the General Term, and in April, 1862, the judgment was affirmed, with costs.

In May, 1862, the Defendants appealed to this Court.

John S. Jenness for Appellant.

A. Spaulding, in person, for Respondent.

FULLERTON, J.—It was found as a fact by the learned Judge who tried this action at Special Term, that the agreement between Bradner & Furman and a part of their creditors, dated the 16th of November, 1854, and their several assignments for the benefit of creditors on the 1st of December following, constitute parts of one and the same transaction, and for that reason, as matter of law, "that said instruments were fraudulent and void as to the Plaintiff and his judgment."

Whether this legal conclusion can be sustained, presents the only question to be examined on this appeal.

It is not pretended that the assignors did not devote the whole

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of their property, both partnership and individual, to the payment of their just debts; but it is claimed that the manner in which it was done, through the agreement of the 16th of November, taken in connection with the assignments, renders the whole transaction fraudulent and void.

When this agreement was made the firm were evidently insolvent, and its terms show that they were desirous of avoiding a general assignment, by effecting a compromise with their creditors; and it was only in the alternative that they should fail in complying with the terms of the compromise, that an assignment was to be made.

Undoubtedly one of the inducements to the creditors, whether it originated with them or the debtors themselves, to consent to the proposed compromise, was that part of the agreement which provided for their preference in the second class of creditors for one-half of the respective claims of those who signed it, in the event that the compromise should not be consummated. But how does such an agreement, by whomsoever proposed, vitiate the assignment which followed, regarding them even as one instrument?

It is quite true that the creditors to whom the agreement was presented, but who did not sign it, might well have supposed that they would not be preferred in the assignment therein provided for; but the agreement itself contains no threat to that effect, nor does it appear that any such was made orally.

On the other hand, it cannot be doubted that the creditors who signed the agreement, did so to increase their prospects of realizing one-half of their respective claims, by being preferred for that amount in the second class of creditors, should an assignment become necessary. But the creditors who were requested to become parties to this agreement, and did not, were left entirely free to elect whether they would comply or refuse. Still it was argued that, in presenting this agreement to their creditors, Bradner and Furman in effect said to them: "Sign this, and you will get half your debt; but refuse, and you will fall into the third class and get nothing." And it was claimed that this was an attempted coercion which the law will condemn.

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I cannot so construe the action of the assignors. What the exact condition of this firm was when the agreement was made, is not among the facts found, nor does it appear in the case. For aught that appears, the condition of the firm at that time, although insolvent, may have been such that a position in the second class of creditors, with a promise of fifty per cent. of the demand, might not have been as desirable as one among the unpreferred creditors with a prospect of getting the whole. Besides, the prospect of the unpreferred creditors realizing their claims might possibly be materially increased in proportion to the number of those who signed the agreement; because, by signing it, they reduced the amount to be paid to them out of the assigned property, respectively, one-half.

And although the assignors were deriving an advantage from this mode of compromise, yet it must be remembered that, whatever that advantage was, it could not be realized by them at the expense of the unpreferred creditors; for the surplus of the estate, after satisfying the demands of the second class of creditors, is, by the terms of the assignment, devoted to the payment of all other claims against the assignors.

It does not follow, therefore, that, if any fraud were practised by this agreement, it was so practised upon those who *did*, rather than upon those who did *not* sign it.

They who became parties to it do not complain. They were willing to accept fifty per cent. of their demands, and release the debtors, irrespective of any benefit which the assignment secures to them, and they now ask that its provisions shall be enforced.

To the position that the agreement which the creditors were requested to sign contained an implied threat that, if they did not execute it, they would be put in the third class and get nothing, it is a sufficient answer to say that it proposes nothing in terms, nor is there anything implied in it which the debtors had not a right to do, if they chose. They were quite at liberty to make the preference they did.

If, in selecting the objects of their preferences, the assignors were guided by mere caprice, or favoritism, rather than by the

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superior claims of some of their creditors over others, it is not a subject of legal complaint.

How then does a thing become *unlawful* because done in pursuance of a threat, which would be lawful if done *without* a threat? The interest is the same, whether expressed or concealed. An unlawful coercion of a creditor cannot be predicated upon the declaration of an intention by a debtor to do what the law sanctions as right and proper. In no sense can it be said that an agreement by a debtor with a creditor to prefer him for one-half his demand in an assignment, on condition or in consideration that he should be released from the balance, is a fraud upon those who refuse to become parties to such a contract. The parties treat upon equal terms. The property is open to the legal pursuit of creditors, and their ordinary legal remedies have not in any degree been obstructed. That being so, and with the property still in the hands of the debtor, there is no legal objection to any contract of compromise between the two (Wakeman *v.* Grover, 11 Wend. p. 201, opinion of Sutherland, J.), even though the consideration for such compromise moving to the creditor, is the advantage of a preference over other creditors in a contemplated assignment; because the motive which prompts the preference, provided it secures an honest debt, is not the subject of legal complaint or inquiry.

It is not claimed that an assignment could provide for a part of the demand of a creditor on *condition* that he should release the balance of it, for that would be clearly void within numerous decisions of our Courts.

But in such case it would be void *only* because such *condition* would hinder and delay creditors.

That was the case in Grover *v.* Wakeman (11 Wend. 187), and in Hyslop *v.* Clarke (14 John. 458), which were relied upon in the Court below, in declaring the assignment in this case void.

But in those cases the delay which the conditions of the assignments caused the creditors in the collection of their demands, was the obnoxious feature which subjected them to condemnation.

In Hyslop *v.* Clarke, the trust created was to pay certain cred-

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itors a part of their respective claims, *on condition* that they should discharge the whole of such debts; and in case of a refusal, then that part of the trust should cease, and the proceeds of the assigned property were to be paid to such persons as should thereafter be designated by certain other creditors named.

In Grover *v.* Wakeman there was a similar provision.

There a class of creditors was preferred who should, within three months after being required in writing by the trustees, agree in writing, under seal, to receive from the trustees such proportions of their debts, respectively, as could be paid, in full discharge of their demands.

In speaking of Hyslop *v.* Clarke, in the case of Grover *v.* Wakeman, Senator Tracy, at page 224, says: "The objection to that assignment was that it did not actually give a preference, but was in effect an attempt on the part of the debtors to place their property out of the reach of their creditors, and to retain the power to give such preferences at *some future time.*"

In his opinion, in the last-named case, the same learned Senator says: "In both cases the debtors seek to continue their control over the property after it is assigned, for the purpose of so wielding it as to coerce their creditors, or some of them, to pay a consideration for that which in justice and good conscience *already* belongs to them" (p. 224).

This control thus reserved to the assignors, and the consequent delay of the creditors, was the only vice of these assignments.

The cases just considered, therefore, are in all their essential features dissimilar to this. There the assignments contained conditions to be fulfilled, in regard to which the creditors were never consulted, to which they never agreed, and which they at once repudiated, and filed bills to have declared void, because they delayed creditors. On the contrary, in this case, that part of the assignment which secured the payment of a sum less than the whole debt to the creditors, was agreed to in writing by such creditors as were affected by it, and they still claim the benefit of it.

Neither was there any feature of it which could delay creditors.

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The whole of the property became *at once* the subject of the trust.

There were no terms to be agreed to, and no conditions to be fulfilled. They were not to be paid *if* they would consent to the compromise, but because they *had* agreed to it.

Surely the Plaintiff was not hindered or delayed in prosecuting his legal remedies because he was requested, but refused, to become a party to the compromise agreement, and thereby lost its advantages, nor yet because the others assented and derived a benefit from it. Nor was he thus delayed, even if, as was held by the learned Judge at Special Term, "the whole proceeding, viewed as one transaction, was an *attempt* to coerce the creditors to enter into the compromise," so long as that attempt did not, in a legal sense, obstruct the Plaintiff in the collection of his demand.

Whatever objectionable features there may have been in the negotiations which led to this agreement, however much the fears of creditors may have been operated on, and however little or much those fears may have tended to induce them to enter into the contract, they are not to be considered in this case.

The question here is not whether the *execution* of the instrument was obtained by fraud, duress, or undue influence, but whether its legal effect, supposing it to have been properly executed, is to hinder, delay, or defraud creditors.

If there were an attempt at coercion, the assignment is not made the instrument to consummate it, as was the case in Hyslop *v.* Clarke, and Grover *v.* Wakeman, and therefore is not affected with that fault.

The objection, therefore, is really not to the instrument itself, but to the influences which procured its execution.

And so far as they are concerned who did execute it, they consented to whatever of sacrifice or loss the terms of that agreement might possibly involve, and are content; and as to those who did not sign it, the attempt at coercion was unsuccessful, and they have nothing to complain of. I am clearly of opinion that the judgments of the General and Special Terms should be reversed, and with costs.

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PARKER, J.—This action was by the Plaintiff, as a judgment-creditor of the former firm of Bradner & Furman, against Gabriel Furman, surviving partner of said firm, and Peter O. Strang, assignee, to set aside for the Plaintiff's benefit a general assignment made by said firm to the Defendant Strang for the benefit of their creditors.

Upon the trial, at Special Term, the assignment was held fraudulent and void as against the Plaintiff, and judgment was rendered accordingly. The General Term affirmed the judgment, and the Defendants have appealed to this Court.

It does not appear from the findings of the Court at Special Term that there was any fraud in fact, unless it is shown upon the face of the assignment, and the agreement in pursuance of which it was executed.

It is found by the Court at Special Term that, in August, 1854, the firm of Bradner & Furman failed in business and were unable to pay their debts, and that on the 16th of November of that year they entered into a written agreement with such of their creditors as were willing to enter into the same, whereby the creditors who signed the agreement covenanted that they would accept and receive from the firm, on or before the 1st day of December, 1854, in full satisfaction of the indebtedness of the firm to them, the paper of the firm for the amount of forty cents on the dollar, payable in six and twelve months, with satisfactory security, and for ten cents on the dollar, payable in eighteen months, without security; or, if the firm should be unable to do that, then in case said firm should, on or before the 1st day of December, 1854, make an assignment to said Strang of all their property, preferring therein as first-class creditors an amount not exceeding $60,000, and preferring the said creditors who entered into said agreement as second-class creditors therein, to the amount of fifty cents on the dollar on their several claims, that they, the said creditors, would in such case, on the execution and delivery of such assignment, discharge them, the said Bradner & Furman, from all liability for the balance or remainder of their claims against said firm.

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It was further found that, on the 1st day of December, 1854, the said firm did make and execute to said Strang an assignment of all their property, in trust, to pay all their debts; that said assignment was made in pursuance of said agreement, containing the recital that the said firm "have agreed to assign the property herein referred to for the benefit of their creditors, in the manner hereinafter mentioned," and that the same conformed to the agreement in preferring, in the first class, not more than $60,000, and in the second class the creditors who had signed said agreement, and them alone, to the amount of fifty per cent. of their respective claims; that the Plaintiff, not having signed the agreement, was not preferred in either the first or second class. And the Court also found that the agreement and the assignment constituted parts of one and the same transaction.

Taking the agreement and the assignment as one transaction, so far as it is possible so to do, it is shown that the creditors who signed the agreement were preferred in the second class *in consequence* of their having agreed to release fifty per cent. of their claims against the assignors; and this is all that is shown on the face of the papers, or by any finding in the case, tending in any respect to invalidate the assignment. It is true that the learned Judge before whom the cause was tried, in his opinion delivered at the Special Term, states one of the grounds of his conclusion that the assignment is, on its face, fraudulent and void as to the Plaintiff, to be "that the whole proceeding, viewed as one transaction, was an attempt to coerce the creditors to enter into the compromise." There is no such fact in the findings, and no such inference can be legitimately drawn from the papers themselves, though taken in connection with the fact, which is found, that the agreement was offered to the creditors for execution by Bradner & Furman, and signed by the creditors whose names are subscribed thereto, at their instance and request. Neither is there anything in the evidence tending to such a conclusion. The bare fact that the assignors presented the agreement to the creditors, and requested them to sign it, and that, in pursuance of such request, they did sign it, surely does not warrant the conclusion

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that threats or other means of coercion were used, or any "moral duress" to procure its execution. The case must rest upon the fact above assented to—that the creditors who signed the agreement were preferred in consequence of their having agreed to release the assignors to the amount of fifty per cent. of their claims against them.

Does this fact render the assignment fraudulent and void as against the Plaintiff?

It is true that, by the arrangement, a benefit to the assignors—the release from a portion of their debts—is provided for. But this, unless it is in some way at the expense or to the detriment of creditors, does not, I apprehend, invalidate the assignment. Unless an assignment devotes the property assigned to illegal uses or trusts, or, by its provisions, operates to hinder, delay, or defraud creditors, no ground is furnished by the assignment itself, upon its face, for setting it aside as fraudulent and void as against creditors.

It cannot be pretended that there is in the assignment under consideration any unauthorized use or trust created. The whole property is placed in the hands of the trustee, to sell and dispose of, and apply the avails to the payment, in a specified order, of all the debts of the assignors, except fifty per cent. of the debts owing to a certain class of creditors, who consent to release the assignee from the payment thereof.

This release does not operate to reserve any portion of the property to the use of the assignors; but whatever is thus saved is to be applied to the benefit of the rest of their creditors.

The delay and hindrance to creditors, incident to the bare fact of an assignment to trustees, is not sufficient to invalidate the assignment (Nicholson *v.* Leavitt, 2 Seld. 516; Townsend *v.* Stearns, 32 N. Y. R. 213); and the transaction in question produces no other hindrance or delay.

The case is supposed by the Respondent, and was held by the Court below, to be within that class of authorities which have declared fraudulent and void assignments in which certain creditors were preferred *on condition* of their subsequently executing releases of their respective demands.

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The law is undoubtedly well settled that such assignments are malâ fide on their face, and void as against creditors (Hyslop v. Clarke, 14 John. 458; Grover v. Wakeman, 11 Wend. 187).

The reason is obvious. It is a clear attempt by the debtor to coerce his creditors to accede to his terms, and a withholding of his property from them, to a greater or less extent, unless they do so accede. This is a hindering and delaying of creditors which the statute prohibits. As was said by the Court, in Hyslop v. Clarke: "It does not actually give a preference, but is, in effect, an attempt on the part of the debtors to place their property out of the reach of their creditors, and to retain the power to give such preference at some future period. . . . If they can keep it locked up in this way in the hands of trustees, and set their creditors at defiance for three months, they may do so for three years, or for any indefinite period."

The case of Grover v. Wakeman is a leading case on the subject. In that case there was a provision in the assignment for a preference to creditors in the second class who should, within three months after being required in writing by the trustees so to do, agree in writing, under seal, to receive from the trustees such proportion of their debts, respectively, as could be paid by the avails then remaining in the hands of the trustees, in full discharge of their respective claims and demands against the assignors.

The Court for the Correction of Errors held that such provision rendered the assignment void. The grounds of that decision appear in the opinions of Judge Sutherland and Mr. Senator Tracy.

Judge Sutherland, after remarking upon the right of an insolvent debtor to give preferences in his assignment, provided he devotes all his property to the payment of his debts, without any reservation or stipulation for his own advantage, says: "But where, instead of directly distributing his property among his creditors as far as it will go, *he places it beyond their reach* by an assignment, not merely for the purpose of saving it from one particular creditor, to be given to another, or to be equally divided among all, but for the purpose of enabling him to *extort from*

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some or all of them an absolute discharge of their debts, as the *condition* of receiving a partial payment, he perverts the power to a purpose which it was never intended to cover, and which the principle on which the right to give preferences is founded will not justify."

The objectionable feature of the assignment in that case, and the distinction between it and the case at bar, will appear more clearly by referring to the remarks of the same learned Judge in his further discussion of the question. "Parties," he says, "not under legal disabilities, may make such contracts as they please, and if they are supported by a consideration, and there is no fraud in the case, they will not be disturbed. If a debtor, therefore, with his property *in his own hands*, and open to the legal pursuit of his creditors, can satisfy them that it is for their interest or the interest of any of them to accept 2s. 6d. in the pound, and give him an absolute discharge, there is no legal objection to it; they treat upon equal terms; the ordinary legal remedies of the creditor are not obstructed. But the case is materially changed when the debtor *first* places his property beyond the reach of his creditors, and then proposes to them terms of accommodation. He obstructs their legal remedies, hinders and delays them in the prosecution of their suits; by putting his property into the hands of trustees, with the view of getting an absolute discharge from his debts, and exempting his future acquisitions from all liability."

Mr. Senator Tracy puts forth more prominently and exclusively the effect of the provision to *delay* and *hinder* creditors *for the benefit of the assignor*, as the ground on which he would declare the assignment fraudulent and void. After adverting to the provision which gives a conditional preference to certain creditors, he says: "This appears to be a positive delay of this class of creditors, by placing the property out of the reach of their legal pursuit, and in a condition that it could not be distributed within any certain time, nor otherwise, except at the discretion of the trustees. . . . . Here the creditors are to be delayed in receiving property which undeniably belongs to them the minute

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it comes to the hands of the trustees. For whose benefit is this delay? Not for creditors, for they will get no more after they shall assent, or refuse to assent to the conditions proposed, than they would get immediately, if there had been no such condition. The delay is manifestly to benefit the debtors, in order that they may secure from it an advantage to which they have no rightful claim. . . . . If the debtors had no right to lock up the property in the hands of their assignees until the creditors would execute releases, what right had they to lock it up in their hands until the assignees should choose to ascertain that the creditors would not execute releases? The principle of the delay is the same in one case as the other."

In the case at bar, neither of the elements of fraud for which the assignment in that case was held void, appears. There is no placing of the property of the debtors in the hands of the assignee, beyond the reach of their creditors, and *then* proposing terms of accommodation; no making of the release a *condition* of the preference; nor does the provision in question impose any hindrance or delay upon the creditors.

Giving the Respondent the full benefit of the finding, that the agreement and assignment are but parts of one transaction, it is impossible to make the transaction, like that in Grover *v.* Wakeman, an assignment with a *conditional* preference, the imposing of which condition, of itself, necessarily produces delay in the distribution of the avails of the property among the creditors. Here, the terms on which creditors would release were agreed upon while the property was in the hands of the debtors, and within reach of the creditors, without any coercion or duress; and the assignment was in pursuance of such agreement. It is, in respect to the provisions complained of as fraudulent, in effect (if any effect is given to the agreement) a composition deed, binding both upon the assignee and the creditors of the second class. There can be no allegation, surely, that, as against these creditors, the provision is fraudulent.

It is what they have consented to and agreed for (Hone *v.* Henriques, 13 Wend. 240; Rapalee *v.* Stewart, 27 N. Y. R. 310).

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And I am quite unable to see how it is fraudulent as against the Plaintiff, or any other creditor of the assignors.

The view above taken is supported by the case of Hastings v. Belknap (1 Denio, 190), in which insolvent debtors having assigned their whole property to trustees for the payment of their debts, "in consideration," as stated in the assignment, "of the full, final, absolute, and unconditional discharge and release of the undersigned, by each and every one of their creditors, of and from all manner of action and actions," &c. The New York Common Pleas, upon the trial, charged the jury that the assignment was upon the condition that the creditors of the assignors should release them, and was therefore intended to coerce the creditors and extort from them a release, and that it was partial, and therefore void. Upon error to the Supreme Court this was held erroneous.

The Court say: "The Court below charged that the assignment was fraudulent and void, because it was *conditional*, to wit: that Jones & Marcy's creditors should release; that it was coercive on their creditors, and made to extort a release. In terms it was absolute, and not conditional. The consideration of the assignment was a release already given or executed, and it was a present absolute assignment for the benefit of all their creditors. This is not an assignment made by a debtor for the benefit of his creditors, *upon condition* that they, in order to receive the benefit of it, shall discharge him from their demands;" and the judgment was reversed. See also Powers v. Graydon (10 Bosw 630).

The Respondent insists that the Appellants took no sufficient exception to the conclusions of law arrived at by the Court, to entitle them to question their correctness. In this the Respondent is clearly mistaken. The case states that "on the 1st day of August, 1860, the Court rendered its decision in writing, as will fully and at large appear in the copy of the same, contained in the judgment-roll herein; and the Defendants' counsel thereafter duly excepted to all and every the conclusions of law in said decision and judgment contained, to wit:"—then setting

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forth the substance of each conclusion of law stated by the Court in the decision.

That in the specifications of exceptions the more full and specific language of the judgment is adopted, rather than that of the decision, cannot prejudice the exceptions, since they specify and point out each conclusion of law, though not in the precise language of the decision. The provision of the statute under which the exceptions were filed is as follows: "For the purposes of an appeal either party may except to a decision on a matter of law arising upon such trial within ten days," &c. (Code, § 268). The "*matter of law*" is sufficiently excepted to if *pointed out with certainty* in the exception, though in language different from that in which it is stated by the Court or referee.

I think the judgment of the Court below is erroneous, and that it should be reversed.

All concur, except GROVER, J.

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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PHILIP PFEIFFER AND SAMUEL FRANKENHEIMER, APPELLANTS, v. BETTEY ADLER, RESPONDENT.

Parol agreement—Consideration—Statute of frauds.

A verbal promise to sell goods to a responsible party, upon the usual terms and for full value, forms no consideration for an independent engagement to pay the antecedent debt of a third party.

APPEAL from the Supreme Court. The action was upon a verbal promise by the Defendant to pay a debt due from her deceased husband to the Plaintiffs.

The issue was referred to Judge Peabody, who dismissed the complaint.

The facts were these: The Plaintiffs sold goods to the Defendant's husband, in the years 1850 and 1851. He died in December, 1854, having reduced the debt by payments, from time to time, amounting in the aggregate to $600, but a balance was still due to the Plaintiffs. After his death she promised, verbally, to pay them this balance; and they at the same time promised to sell goods on credit to her to enable her to carry on business, and to assist her in settling with other creditors of her husband, and these promises they fulfilled. There was no written engagement between the parties, and she paid only about $50 on account of her husband's debt.

The judgment dismissing the complaint was affirmed on appeal to the General Term in the First District.

C. A. Runcle for Appellants.
John H. Reynolds for Respondent.

PORTER, J.—It does not appear that the husband left any property, or that the widow had any interest to subserve by assuming the payment of his debts. She was under no obligation to the Plaintiffs, unless one was created by her unwritten promise to pay what she did not owe. The original demand was not extinguished by the arrangement, and there was no such new consideration as would suffice to take the case out of the Statute of Frauds. The

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settlement which the Plaintiffs were to aid her in negotiating was of the debts of another, for which she was not liable, and in which she had no personal concern. She was evidently in good credit; for the Appellants were willing to trust her for the amount of her husband's debt, and for all she was willing to purchase. A verbal promise to sell goods to a responsible party, for full value and on usual terms, formed no consideration for an independent engagement to pay the antecedent debt of a third person. There is nothing in the facts found by the referee to withdraw the agreement from the operation of the Statute of Frauds (Mallory v. Gillett, 21 New York, 412).

The judgment should be affirmed.

All the Judges concurred, except BOCKES and GROVER, JJ., who were for reversal.

GROVER, J. (dissenting).—The only question in this case is, whether the promise made by the Defendant to pay the Plaintiffs a debt due them from the deceased *husband* of the Defendant, was within the Statute of Frauds. If it was, the judgment of the Supreme Court holding it void was correct, and should be affirmed. From the facts found by the referee, it appears that the promise was verbal and made in consideration of a sale of goods upon credit by the Plaintiffs to the Defendant, and of assistance to be rendered by the former to the latter, in settling the affairs of the husband; that the Plaintiffs performed the contract on their part; that the Defendant paid a small portion of the debt, and refused to pay the residue. This contract is not within the statute, although one of its subjects was a pre-existing debt due from Defendant's deceased husband.

Her contract to pay it was founded wholly upon a consideration received by her, and was in no sense collateral to the debt against the husband. She became the only debtor upon that contract, and in no sense surety for the estate of her husband for its payment.

Such cases are not within the statute (Leonard *v.* Vredenburgh, 8th Johns. 29; Mallory *v.* Gillett, 24th N. Y. 412).

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There must be a consideration, but the promise need not be in writing.

The consideration in the present case was sufficient.

The judgment appealed from should be reversed.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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JOHN RADWAY AND OTHERS, APPELLANTS, v. JEREMIAH BRIGGS AND NATHANIEL BRIGGS, RESPONDENTS.

Lessees of Wharf—Possession—Damage—Negligence.

In order to maintain an action against a lessee of a public wharf in the city of New York, for damage sustained by the Plaintiff by reason of the lessee's neglect to keep such wharf in good repair and safe for public use, it is not necessary to show the Defendant in exclusive possession of such wharf. It is sufficient to show that Defendant accepted the lease and exercised rights under it.

APPEAL from the Common Pleas in the city of New York.

The Plaintiffs brought their action to recover the value of a horse and cart, and a load of merchandise. On the trial they proved that in March, 1858, their carman drove upon one of the public piers in the city of New York, with a load of merchandise, to deliver it on board of a steamer lying there; that whilst there the horse became unmanageable, backed into the river, and was drowned. They also proved that the string-piece on the westerly side of the pier (the side on which the horse backed off) was in an unsafe condition, being not more than *two inches* above the surface of the pier.

They further proved a lease from the corporation of the city of New York to the Defendants, bearing date March 4th, 1855, which first recited that the corporation was the owner of several wharves, slips, piers, or bulkheads in said city, and entitled to collect and receive the wharfage and slippage thereof, and had agreed to sell and assign their right to the collection of wharfage at some of them to the Defendants, for the term of five years from the 1st day of May then ensuing. This instrument then proceeded to convey to the Defendants, "their heirs and assigns, all and singular the wharfage which shall or may arise, accrue, or become due, between May 1st, 1855, and May 1st, 1860, for the use or occupation, by vessels of more than five tons burden, of any of the wharves, slips, piers, or bulkheads belonging to said

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parties of the first part in the East River, or of, in, or to which they are entitled to receive and collect the wharfage and slippage thereof, at the west side of Pier No. 12, and the bulkhead adjoining the foot of Old Slip, excepting all such docks, wharves, piers, and slips as are otherwise leased by said parties of the first part, or used for ferry purposes." The Defendants covenanted "during the continuance of said lease, to keep the said wharves, piers, or bulkheads in good repair, at their own proper cost and charge, and surrender the same at the expiration of said term, in as good condition as they are at the time they take possession thereof, the natural wear and decay excepted."

They also covenanted that, during the same period, they would "keep the wharves in good condition and safe and proper repair, *including especially the string-pieces*, and other superficial portions thereof, *for safe usage*," &c., &c.

They also covenanted that they would, "on the last day of the term demised, or other sooner determination thereof, surrender and yield up the said rights and privileges hereby demised, with all and singular the rights, members, privileges, and appurtenances thereto belonging, into the hands and possession of the parties of the first part, without fraud or delay." The Defendants agreed further, on their part, that no demand should be made, nor any compensation received, for the occupation of the top or surface of any of the public wharves or piers, for any purpose whatever.

At the close of the Plaintiffs' evidence, the Defendants' counsel moved to dismiss the complaint, on the ground that the Plaintiffs had not shown that the Defendants were in possession of the premises in question at the time of the occurrence, and the Court granted the motion.

The General Term affirmed the judgment, and the Plaintiffs appealed to this Court.

Charles N. Black for Appellants.

Benedict, Burr & Benedict for Respondents.

FULLERTON, J.—It was not necessary for the Plaintiffs to prove

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that the Defendants were in the actual possession of the pier, to enable them to recover in this case.

They were not entitled to the exclusive possession, by the terms of their lease; neither was it in the power of the corporation to grant it to them.

A public pier is a part of the public highway, and must be devoted to the public use. The exclusive use of a public pier may be granted by the Common Council of the city of New York to vessels engaged in commerce, or for commercial purposes (Davies' Laws, 705), but not to individuals for private purposes, to the exclusion of the public. It has been suggested, too, that this must be done by the city in its legislative capacity, and not by mere contract through its officers (The Mayor *v.* Rice, 4 E. D. Smith, 609). By various statutes of this State, authority is given to the owners of private wharves or piers, and to the corporation as to public piers, to collect wharfage and slippage from vessels that occupy them—the rates being fixed by law.

The accident in this case occurred on one of the public piers of the city of New York, for the use of which the city had the right to collect wharfage, being charged, of course, with the correlative duty of keeping it in repair. The legal effect of the instrument given in evidence on the trial was to subrogate the Defendants to the place of the corporation, investing them with all the rights and subjecting them to all the duties of that body, as the owner of a public pier.

This will appear plain when reference is made to the terms of the instrument. It sells and assigns the *wharfage*, which shall or may arise, or accrue, during the time covered by the lease, the lessees agreeing to keep the premises in repair.

But it does not purport to give possession of the property; on the contrary, the lessees were required to covenant that "no demand should be made, nor any compensation received, for the occupation of the *top* or *surface* of such wharves or piers, for any purpose whatever."

The Defendants in this case, therefore, had no other right in or to the use or possession of the property not enjoyed by every

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other citizen in common with them, except the right to collect the wharfage to which their agreement entitled them, and the right to enter for the purpose of making repairs, in compliance with their covenant.

I have not overlooked the fact that the lessees covenanted "to surrender the piers at the expiration of the time, in as good condition as they were at the time they took possession thereof."

But these were not apt terms to express the real meaning of the parties. This language was used in connection with, and is a part of, the covenant to keep in repair, and was designed to express the condition which the property should be in at the expiration of the term, rather than to define the tenure by which the Defendants held it.

This is rendered the more apparent when we refer to another clause, at the close of the instrument, where the lessees covenant to "surrender and yield up the *rights and privileges* demised."

The naked right to collect wharfage (which was all that the Defendants possessed) is incorporeal in its nature, and is incapable of any other or different possession than grows out of the right itself, and is incidental thereto, and which attached, by force of the agreement which originated it, immediately on its execution and delivery (East-Haven *v.* Hemingway, 7 Conn. 186, 203).

When, therefore, the Plaintiffs were nonsuited on the ground that they had not shown that the Defendants were in possession of the premises under their lease, the Court overlooked the distinction between the bare right to collect wharfage and the actual physical possession of the premises in connection with which the right was exercised.

If a turnpike company should sell and assign the tolls which it had a right to receive, the assignee agreeing to keep the roadbed in repair, in an action against such assignee for damages growing out of his neglect to perform his duty, it would not be pretended that it would be necessary to prove that he had entered into possession of the highway.

It was necessary, however, to prove that the Defendants accepted the grant, in order to make them liable for the Plaintiffs' loss;

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this being quite a different thing from the question of the possession of the premises. But that acceptance was proved by the introduction of the lease, for it was signed by the Defendants themselves.

Even if that had not been the case, the acceptance would have been presumed, upon the principle that a man is presumed to accept that which is a benefit (Camp *v.* Camp, 5 Conn. 291; Doe *v.* Marston, 3 Wend. 149; Bailey *v.* Culverwell, 8 Bar. & Cres. 448; Townson *v.* Tickell, 3 Bar. & Ald. 31).

Having accepted the grant, the Defendants were bound to keep the premises in repair. The damage which the Plaintiffs sustained was caused by their neglect, and they are liable for it. The city exercised due care on its part, when it required the Defendants to keep the premises "in good condition, and *safe* and proper repair, including especially the *string-pieces.*"

And this the Defendants failed to do.

It was the want of a safe and proper string-piece that caused the accident, and the Defendants are clearly liable (Burton *v.* Barclay, 5 M. & Payne, 785; Mayor of Albany *v.* Cunliff, 2 Com. 165; Henley *v.* The Mayor of Lyme, 3 B. & A. 77; Brett *v.* Cumberland, Cro. Jac. 399, 521; 4 Cush. 277).

The judgment should be reversed, and a new trial ordered.

All concur, except HUNT and BOCKES, JJ., not voting.

Reversed.

JOEL TIFFANY,
State Reporter.

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FRANKLIN W. HUNT, Respondent, v. THE MICHIGAN SOUTHERN AND NORTHERN INDIANA RAILROAD COMPANY, Appellants.

Common Carrier—Presumptive negligence—Shipping Receipt—Evidence.

Procuring a third party, without examination of the goods, to sign a receipt declaring the packages to be in good order, furnishes no evidence of the condition of the goods at the time of signing such receipt.

Appeal from the New York Common Pleas.

The action was for injury by the negligence of the Defendants to the medical library of the Plaintiff, which was delivered to them as carriers for transportation.

The books were received by the Defendants, properly boxed, in perfect order, at Rolling Prairie, Indiana, on the 5th of April, 1854. In their receipt of that date they stated that they were to forward them to the Plaintiff at Bergen, New Jersey, without further liability after railroad or lake shipment, or loss by fire.

The Plaintiff, who is a physician residing in New York, after his return went to Bergen, from time to time, for the property, but could get no account of it. At length, some three weeks after the delivery to the Defendants, he found the boxes at Jersey City, in the depôt of the New York and Erie Railroad Company. They were dry and in apparent good order. He paid the freight and took them home; when, upon opening the boxes, he found that the contents had been wet, that the books had been soaked through, and that the injury had occurred so long before that the bed-clothes boxed with the books were all mildewed. The property was damaged to the extent of $150.

The Defendants gave no evidence to exonerate themselves from the imputation of negligence on their own road, nor to explain what was done with the boxes during the three days which intervened between their shipment at Rolling Prairie and their delivery to the next carrier at Toledo. The Appellants introduced the receipt of the Cleveland and Toledo Company, dated on the

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8th of April, covering a large amount of property, in which this was included, and describing the whole as in good order and condition. It did not appear, however, that the goods were examined at all, or that they were in good order in fact. The Marine Court, upon these facts, held that the damage was due to the Defendants' negligence; and the judgment was affirmed on appeal to the New York Common Pleas, the opinion of the Court being delivered by Judge Daly.

Charles Tracy for Appellants.
Wm. W. Miles for Respondent.

PORTER, J.—There is nothing in the evidence to justify the claim that the property was injured after it passed from the custody of the Defendants. The mildewed condition of the blankets indicated that the goods were drenched at an early stage in their transportation. If the fact was otherwise, the Appellants had the means of proving it. They furnished no explanation of the detention of the property for three days on the way from Rolling Prairie to Toledo, and it is fair to infer that the injury occurred within that period. This inference is not repelled by the circumstance that they procured a third party to sign a receipt, without examination, describing the packages as in good order on their reshipment at Toledo. This simply confirmed the evidence of the Plaintiff, that there was nothing in the exterior appearance of the boxes to indicate the damaged condition of the contents. The question was one of fact. No error of law was committed on the trial, and the Court below was right in affirming the judgment.

All the Judges concurring,
Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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FREELAND T. BARNEY, LESTER S. HUBBARD, AND WILLIAM DURBIN, RESPONDENTS, v. SAMUEL K. WORTHINGTON, APPELLANT.

Letter of Credit—Acceptance of Draft—Extrinsic evidence—Form of Complaint.

Extrinsic evidence is competent to enable the Court to understand the purpose for which a draft was made, and to interpret and apply its language.

Where the Defendant enters into an arrangement with other parties to the effect that a draft is to be drawn upon him on time, and is to be discounted and the avails thereof paid over to him, and for that purpose writes a letter of credit to be used in procuring the discount, he is to be deemed the borrower, and is liable for the proceeds thereof coming to his hand, independent of the question of acceptance.

APPEAL from the Superior Court of the City of Buffalo.

The action was for the recovery of the amount of a draft on the Defendant, made by Burton & Hubbard, for the sum of $3,000, which the Plaintiffs discounted, as they claim, on the faith of a letter written by the Defendant, who received the proceeds of the discount, but refused to accept the bill.

The complaint contained three counts; two of them upon a promise to accept and pay the draft, and the third for money lent and advanced at the Defendant's request. The cause was tried before Judge Verplanck, without a jury.

The following, among other facts, were proved on the trial: The firm of Burton & Hubbard was composed of Marshall Burton and Lucius F. Hubbard. They were in the produce and shipping business in the State of Ohio. They were in the habit of consigning their produce to the Defendant, a commission merchant at Buffalo, and of drawing drafts against it, which he had always accepted. He had made advances to them, prior to the date of the draft, to an amount several thousand dollars in excess of the estimated value of the property he had received as their consignee; but this fact was unknown to the Plaintiffs.

On the 14th November, 1860, two days before the date of the draft, Lucius F. Hubbard, one of the firm, was at the Defendant's

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office in Buffalo. The Defendant wished them (Burton & Hubbard) to furnish him some money. He wanted them to raise some money for him to help meet his acceptances. Hubbard replied that it would be impossible without his assistance. The Defendant asked him if he could raise some money at the West. Hubbard said they probably could by making drafts on him, payable in New York; and if the Defendant thought it best, he would write to his partner to make such drafts. The Defendant told him he had better do so. Hubbard said that, in order to raise money in that way, it might be necessary to have his acceptance or letter of credit, to show that he would accept the paper. The Defendant replied that this would not be necessary; that he would write to Mr. Burton and arrange all that. Hubbard suggested that the paper should be made payable at Ketchum, Son & Co.'s, or at the Union Bank. The Defendant left it to their preference, and remarked that he might be glad to have them raise, in that way, eight or ten thousand dollars, if they could do so; and he directed them to make the drafts for $2,500 or $3,000 at first, and to send the proceeds to him.

The Defendant afterwards told Hubbard that he had written to Burton to make drafts on him, payable in New York, and raise money on them. The letter was as follows:

"BUFFALO, *November* 14, 1860.

"M. BURTON, Esq.:

"DEAR SIR—Mr. H. has written you the state of things here. We have shipped all we could, and sold the balance. Now, in order to get along, and put up the necessary margins here which New York houses will require, it will be necessary to have more ready funds. Our banks are tightening up, and throw off all the customers they can. I have given them the canal bills, without consignees as yet, and am waiting to hear from W., and R. H. & Co.

"*You will make your draft for* $3,000, *or two drafts for* $2,500 *each, on as long time as you can, and forward the funds as early as you can, as I must on the* 18*th arrange a portion of the drafts here.*

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"I hope markets will improve and pay well for the expense and trouble we are to in getting this grain forwarded. Don't delay in arranging and remitting.

"Yours truly,

"S. K. WORTHINGTON."

It was proved that the drafts or acceptances referred to in the letter, which the Defendant had to meet, were personal papers of his own, with which Burton and Hubbard had nothing to do, and that there were no outstanding drafts by them; that the last of his acceptances for them had been paid by him twelve days before this letter was written.

The Defendant, who was sworn on the trial, admitted that his dealings were with the firm; that he never had any individual transactions with Burton, and that there was no arrangement for his making an individual draft upon him.

On receiving the letter of the Defendant, with one from Hubbard, Burton went on the 16th of November to the Plaintiffs, who were bankers at Sandusky; made a draft, in the name of his firm, on the Defendant for $3,000, payable sixty days after date at the office of Ketchum, Son & Co., New York; communicated to them the contents of the Defendant's letter, and the fact that the proceeds were to be remitted to him, and they thereupon discounted the draft on the faith of the Defendant's responsibility. The Defendant admits that he received the proceeds, and that he supposed them to be the avails of this draft at the time he received them.

Specific objections were taken to the introduction of the letter and the draft, and to the admission of parol proof of the antecedent and surrounding circumstances; and exceptions were duly taken to the several rulings of the Court.

The Judge found, in substance, the following facts: On the 14th of November, 1860, the Defendant, in writing, directed and empowered Burton & Hubbard to draw upon him the draft in question; and such direction and authority were intended by him as a letter of credit to enable them to procure the draft to be discounted. On the 16th of November Burton & Hubbard pro-

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cured it to be discounted; and the discount was made on the faith of such direction, authority, and letter of credit. The proceeds were paid to the drawers, and remitted by them to the Defendant. On due presentation of the draft he refused to accept it, and he afterwards refused to pay it at maturity. The Judge gave judgment in favor of the Plaintiffs for $3,113.75, the amount of the draft, with interest.

The judgment was affirmed on appeal to the General Term.

John Ganson for Appellant.
John S. Talcott for Respondents.

PORTER, J.—The letter of the Defendant, though addressed to the partner who happened to be at home, was evidently intended to authorize a draft by the firm. It is to be read in the light of the surrounding circumstances, proof of which was properly admitted to aid the Court in ascertaining the purpose of the paper, and in applying and interpreting its language (Hutchins *v.* Hebbard, 34 New York, 24; Agawam Bank *v.* Strever, 18 id. 509; Blossom *v.* Griffin, 3 Kernan, 569; French *v.* Carhart, 1 Comstock, 102).

The Defendant was substantially the borrower. Burton & Hubbard were indebted to him on an open and current account, but they had no available means of payment. His own paper was maturing, and he wished them to borrow in Ohio, for his use, what he could not obtain at home, in the then stringent condition of the money market. They told him they could not obtain the loan without the aid of his credit; and he accordingly furnished them with a written authority to make the draft, for the precise purpose of giving credit to the paper, of which he was to receive the proceeds.

The Judge seems to have been of opinion that as there was no agreement, *in terms*, to honor the draft, the transaction did not amount to an unconditional promise of acceptance within the meaning of the statute. He held, however, that the Defendant was responsible, as upon *a letter of credit*, on the faith of which the Plaintiffs made the discount. In a rigid and technical sense that name may not be strictly appropriate; and yet, in view of

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the intention with which the letter was written, and the purpose for which it was to be used, the designation can scarcely be called a misnomer. In its substantial office, the writing was really a letter of credit; but it was also something more. In view of the circumstances under which it was given, the Defendant's unqualified authority to draw on him for the amount was equivalent to an unconditional promise to pay the draft. The absence of technical promissory words is of no practical moment, where the language employed is such as to raise an imperative legal obligation (Bank of Michigan *v.* Ely, 17 Wendell, 508, 512; Ulster County Bank *v.* McFarlan, 5 Hill, 432).

The objection that the complaint is insufficient to uphold the judgment is one which we cannot sustain. It is based on the statutory provision that a written and unconditional promise to accept a bill, before it is drawn, shall be deemed an actual acceptance in favor of a party purchasing on the faith of such an engagement. It was not designed to prescribe a form of pleading, but to furnish a rule of judgment. Under our present system a party is at liberty in his complaint to state the actual facts which raise a cause of action in his favor. In the present case the Plaintiffs alleged the promise made by the Defendant, and his refusal to perform it; they proved the truth of what they averred; and they deduce their title to judgment through a statute which makes these facts conclusive in support of their legal right.

The judgment should be affirmed.

All the Judges concurring,

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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GEORGE A. DILLINGHAM, APPELLANT, v. CARLOS A. BOLT AND SAMUEL LADUE, RESPONDENTS.

Chattel mortgage—Renewal—Filing—Non-residence.

Where the mortgagor of chattels has sold his interest therein and removed from the State, so as to render it impossible for the mortgagee to comply with the statute to continue the lien by a refiling of the mortgage, &c., the mortgagee must avail himself of his rights against the property within the year, if he would protect himself against subsequent bonâ fide purchasers.

The mortgagor having removed from the State within the year, renders it impossible to refile the mortgage in the office of the clerk, &c., where the mortgagor is then residing.

PARKER, J.—This action was brought to recover possession of a canal-boat. The Defendants, in their answer, justified the taking and detention complained of, under a chattel mortgage executed by a former owner of the boat to Defendant Ladue.

The cause was referred, and the trial before the referee resulted in a judgment for the Plaintiff, which judgment was reversed by the Court, at General Term, and a new trial ordered.

The referee found, as facts, that on the 27th of July, 1855, one James Thistle, then a resident of the town of Sweden, in the county of Monroe, owned the boat in question, and, being indebted to the Defendant Ladue in the sum of $70.97, on that day executed to him the mortgage set forth in the answer, which was filed in the office of the town clerk of said town of Sweden, on the 28th of July, 1855. That in October, 1855, Parmelee, Everitt & Co., for a valuable consideration, without knowledge of the mortgage and in good faith, bought the boat of Thistle, he having continued and then being in possession thereof. That Parmelee took possession of the boat, and continued in possession until August, 1856, when the Plaintiff purchased it of him in good faith, for a valuable consideration, and without any knowledge of said mortgage; took it into possession, and continued to hold it until September 2d, 1856, when, the amount secured by the mortgage being past due and unpaid, the Defendants took the

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boat from the Plaintiff by virtue of said mortgage, the Defendant Bolt acting under the direction and as the agent of the Defendant Ladue.

That on the 27th of July, 1856, a copy of the mortgage, with the following statement thereon, was filed in the office of the town clerk of the said town of Sweden, to wit: "The said mortgage, of which the within is a copy, is unpaid, and there remains due thereon the sum of somewhere about sixty dollars, as near as the same can be estimated, and the mortgagee claims an interest therein to that amount or thereabouts. That he has a good, valid, and subsisting lien on the property therein until the same is cancelled."

His conclusions of law were, that the mortgage was good in its inception; that the statement exhibiting the interest of the mortgage was sufficient in point of form; that the Plaintiff was a subsequent purchaser in good faith, and that the mortgage ceased to be valid as against him, after the expiration of one year from the original filing thereof, for the reason that the copy and statement were not again filed in the office of the clerk of the town where the mortgagor *resided at the time of such refiling.* Hence judgment was ordered for the Plaintiff.

As against Parmelee, Everitt & Co., who purchased before the expiration of the year from the first filing of the mortgage, no refiling with a statement was necessary. It was held in Meech *v.* Patchin (14 N. Y. R. 71), that the omission to refile a chattel mortgage, pursuant to the third section of the act on that subject (Laws of 1833, 402), does not render it invalid against purchasers or mortgagees intermediate the original filing and the ending of the year; and that the term "*subsequent,*" in the provision in that section, that "every mortgage filed in pursuance of this act shall cease to be valid, as against the creditors of the person making the same, or against *subsequent* purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless," &c., means subsequent to the expiration of the year—that is, after the time of refiling has elapsed. Had these purchasers, therefore, who purchased before the expiration of the

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year, continued to be the owners until September 2d, 1856, when Defendant Ladue took the property under his mortgage, there could be no pretence, inasmuch as they were not subsequent purchasers, that they could have held it against the mortgage, even if there had been no attempt to file the copy and statement.

The Plaintiff purchased of them after the year. Is he, within the meaning of the act, a subsequent purchaser?

The General Term held he was not, but stood in the shoes of Parmelee, taking no better right than he had; and *therefore* decided that the Defendants, under the mortgage, had the better claim, and reversed the judgment. In this view of the case, I cannot but think the General Term erred. It seems very clear to me that the Plaintiff is a subsequent purchaser, within the meaning of the act.

The statute does not expressly limit the term "purchaser" to the purchaser directly from the mortgagor, nor do I think there is any such limitation implied or intended. The object of the original filing of the mortgage is to give public notice of the lien, thereby affixing to the property mortgaged, as it were, an ear mark, indicating to all persons who would purchase it the existence of the lien; and this, not only while remaining in the hands of the mortgagor, but in whose hands soever it may be. The effect of this notice attends the property as it passes from hand to hand during the year, so that no purchaser, however remote from the mortgagor, can hold it as against the mortgage. As the filing of the mortgage is to avail the mortgagee as notice of the lien, not merely to the immediate purchaser from the mortgagor, but to all subsequent vendors, so the requirement to file it, and thus give the notice, was in order to protect purchasers, not from the imposition of the mortgagor alone, but against that of all the successive purchasers from him down to the end of the year. As the notice is for the benefit of all purchasers during the year, all are entitled to it, and all may take advantage of its omission.

The same is true of the refiling and statement required by the third section of the act. The object of that is merely to extend

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and continue in operation the effect of the first filing, as to the amount remaining unpaid, for another year.

I can see no reason, therefore, why the Plaintiff, although his purchase was not directly from the mortgagor, but from his vendee, is not to be deemed a *subsequent* purchaser, within the meaning and intent of the act, as well as within its terms. If he was, then the refiling and statement required by the third section was necessary to prevent his bonâ fide purchase from overreaching the mortgage and giving him a title unencumbered by it.

It is said, however, by the Respondents' counsel, that a person cannot convey a better title than he has, and therefore the Plaintiff acquired by his purchase from Parmelee no better title than Parmelee had, which was a title subject to the lien of the mortgage.

The principle evolved by the counsel can have no application, I apprehend, to cases under the registry law. The mortgagor, Thistle, for example, subsequent to the giving of the mortgage, had no legal title to the canal-boat; and yet if he, remaining in this State, had retained it until after the expiration of the year, and then sold it to the Plaintiff, in the absence of the refiling no one would doubt that Plaintiff would have held it free from the lien of the mortgage, notwithstanding Thistle's right was subject to the mortgage.

But for the fact, then, that Thistle had left the State, and during the thirty days next preceding the close of the year did not reside in it, I should be very clearly of the opinion that the judgment of the General Term ought to be reversed. The question arises, however, whether such removal and non-residence did not render the refiling unnecessary. Although, at first view, it would seem that the requirement of the statute, making a refiling necessary within thirty days before the expiration of the year, cannot apply to cases where the mortgagee is not, during the thirty days, a resident of the State, because the refiling is specifically required to be in the office of the clerk of the town "where the mortgagor *shall then* reside," which requirement is nugatory, if the mortgagor does not then reside in the State; still, in view of

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the specific provision of the same section, that "every mortgage filed in pursuance of this act *shall cease to be valid*, as against subsequent purchasers in good faith, after the expiration of a year from the filing thereof, unless, within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage, together with a statement," &c., "shall be again filed in the office of the clerk of the town where the mortgagor shall then reside," we think it must be held that, when the contingency occurs which has happened in this case, the mortgagee must, as against the creditors and purchasers mentioned in the section, take advantage of his mortgage within the year, or lose the benefit of it as against them. The declaration that it shall cease to be valid unless refiled was, we think, intended to operate as well when the refiling was rendered impossible by the removal of the mortgagor, as when it was omitted for any other reason.

The refiling made in the case before us, in the town where the mortgagor had formerly resided, was of no avail, and it is unnecessary to examine the question whether the statement was such as the statute requires. It follows that the lien of the mortgage had ceased as against the Plaintiff, and the referee was right in ordering judgment in his favor. The judgment of the General Term, reversing that judgment, was therefore erroneous, and must be reversed.

All concur.

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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JOHN H. BARRINGER *v.* STANLEY HAMMOND AND WILLIAM H. SHEPARD.

Fraudulent Vendor—Bonâ fide purchaser.

A bonâ fide purchaser for value from a fraudulent vendor acquires a good title.

Horace Thomas for Respondent.
D. O. Hyde for Appellants.

GROVER, J.—The bill of sale from Louis Baron to De Lorme was properly received in evidence.

It appeared that Baron once owned the horse, and the Plaintiff made title through De Lorme.

The bill of sale was competent to show that Baron transferred the horse to De Lorme. The conclusions of law drawn by the referee, from the facts found by him, were correct.

The only question of law raised by the exceptions to the report is, whether a bonâ fide purchaser from a fraudulent vendor acquires a good title to the property.

The law upon this point has long since been settled that he does (Mowrey *v.* Walsh, 8 Cowen, 238; Lewis *v.* Palmer, Hill and D. Sup. 68).

The judgment appealed from must be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

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ISAAC H. BRONNER AND OTHERS, RESPONDENTS, v. SAMUEL FRAUENTHAL, APPELLANT.

Evidence, Conflict of—Declarations in absence of Defendant—Lost Note—Parol Proof of Endorsement.

In an action for goods sold and delivered, upon the question whether Plaintiffs trusted a third party, rather than the Defendant, for the bill of goods, there being a conflict of testimony on that point, it is competent for the Plaintiff to prove that he was informed at the time that said *third party* was untrustworthy, the witness giving him such information.

E. F. Hall for Appellant.
A. J. Parker for Respondents.

DAVIES, CH.J.—The Plaintiffs, composing the firm of Bronner & Brothers, seek to recover in this action the amount of a bill of goods, which they claim they sold to the Defendant. The Defendant, on the contrary, claims that the goods were sold to one Samuel Lowenstein.

Seckel Bronner, one of the Plaintiffs, testified, without objection, that on the day the goods were sold to the Defendant he refused to sell the goods to said Lowenstein, and that Nathaniel C. Bishop had at that time told him not to trust said Lowenstein, because he was not responsible.

The said Bishop was then called as a witness on behalf of the Plaintiffs, and was asked this question: "State whether you knew, when Lowenstein came there, anything concerning his responsibility; and if so, whether you made any communication on that subject to the Plaintiffs?"

This was objected to by the counsel for the Defendant, on the ground that the Defendant was not shown to be present at the time.

The Court overruled the objection, and allowed the question to be put, and the Defendant's counsel excepted.

This exception is now urged upon us, as a ground for reversal of the judgment in the action.

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It is to be observed that the ground of the objection assumes an answer which the question did not call for.

The witness was not asked what communication he did make to the Plaintiffs on the subject of the Defendant's responsibility.

If the question had been of this character, then the objection would have had point and relevancy.

The question embraced two propositions: 1. Whether the witness knew anything of the responsibility of Lowenstein, when the latter came to purchase the goods; and 2. If he did, whether he made any communication to the Plaintiffs on that subject.

As to the first branch of the question, it is not perceived, nor is it now urged, that any sound objection exists to it. Many purposes suggest themselves why the Plaintiffs might need to ascertain whether the witness had any knowledge on this subject.

The fact of such knowledge was legitimate, and if it had appeared from his answer that the witness had it, it would then have been competent to inquire of him how he became possessed of that knowledge, and if from Lowenstein himself, it cannot be doubted that it would be competent to show that the same had been communicated to the Plaintiffs; and it was wholly immaterial whether they derived it directly from Lowenstein himself, or mediately through the witness; and it was equally immaterial whether the Defendant was present or absent when such knowledge came to them. The issue made by the Defendant upon the trial was, that the goods were sold to Lowenstein, and not to himself. To this the Plaintiffs replied, that they did not sell to Lowenstein, and they refused to sell to him, as the witness Bishop had told them not to trust Lowenstein, because he was not responsible. This testimony greatly corroborated the statement of the Plaintiffs, that they did not sell to Lowenstein, as it is not to be credited that they would sell to an irresponsible man. As such testimony had been given without objection, there could not be any good objection to the second branch of the question, even if it had gone to the extent of inquiring as to the nature of the communication made by Bishop to the Plaintiffs on the

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subject of Lowenstein's responsibility. The Defendant had no concern with that communication, and he had no ground to insist that the Plaintiffs could not ascertain the fact of Lowenstein's responsibility, except in his presence. But the question did not call for the communication, but only the fact, whether any communication on this subject was made by the witness. There could be no objection to such an inquiry; neither could the Defendant object that the Plaintiffs ascertained Lowenstein's irresponsibility when he was not present.

The claim of the Plaintiffs in suit was assigned by them for the benefit of their creditors, and they having made a settlement with their creditors, the same was reassigned to them.

While in the hands of their assignee, a brother of Samuel Lowenstein called upon a clerk of the assignee, and purchased said claim, and gave in payment four notes of $189.82 each, at two, four, six, and eight months.

The clerk stated at the time he had no authority to make the arrangement; and the assignee, on being informed of it, repudiated the transaction.

The clerk also testified that he never received the notes, never held the notes, and had never seen them. And the notes were returned by the person with whom they were deposited for the assignee.

One Fulda was the agent in procuring said purchase of said claim, and said notes were delivered to him for that purpose. He testified that all the notes were returned to him, and that he had them all before any of them became due.

Samuel Lowenstein was then called as a witness for the Defendant, and the following question was put to him in reference to one of the notes delivered to Fulda:

"By whom was the note you saw in Rochester endorsed?" The question was objected to by the Plaintiffs' counsel, on the ground that the loss of the note was not proved, and it was not shown to be in Plaintiffs' possession.

The objection was sustained, and the question excluded, and the Defendant's counsel excepted. The arrangement in regard

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to the notes having been cancelled, and they returned to the possession of Fulda, the agent of Lowenstein, it was wholly immaterial by whom the note inquired of was endorsed.

It was not important that this evidence was not objected to on the ground of its immateriality. Evidence offered in support of immaterial issues may be rejected on the trial, although not objected to by either party (Corning *v.* Corning, 2 Seld. 97).

The exception taken to the admission of the deposition de bene esse of Fulda, a witness on the part of the Plaintiffs, is untenable, and was properly overruled.

It was proven that he (the witness) resided out of the State, and that inquiries had been made, at the time of the trial, at his usual places of stopping when in the State, and the result left a reasonable ground to infer that the witness was not at the time within the State.

This preliminary proof fully met the requirements of the cases (Donnell *v.* Walsh, 6 Bos. 621; Nixon *v.* Palmer, 10 Barb. 175).

These are the only exceptions taken by the Defendant, and upon which it is claimed that the judgment should be reversed.

It has been seen upon examination that they cannot be sustained.

The jury found a verdict for the Plaintiffs, and judgment thereon was affirmed at the General Term of the Superior Court of New York.

The judgment must be affirmed, with costs.

PARKER, J.—The only questions for examination upon this appeal arise upon rulings made at the trial in regard to the admission and rejection of evidence.

The action was for goods sold and delivered. The answer denied the sale to the Defendant, and alleged that the Plaintiffs sold the goods in question to one Samuel Lowenstein; and further set up as a defence, that the Plaintiffs made a general assignment of all their property, including the demand in question, to one Moses Bronner; and that the said assignee afterwards sold and as-

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signed the said demand to one Joseph Lowenstein, to whom the said Samuel Lowenstein had paid the same.

After the Plaintiffs had given proof respecting the sale and delivery of the goods in question to the Defendant, his counsel, on cross-examination of Plaintiffs' witnesses, drew out proof which, unexplained, tended to show that the goods were sold, and the credit given to Samuel Lowenstein, and not to the Defendant, and that the Plaintiffs were willing to trust Lowenstein, believing him to be responsible; and tending to contradict and discredit the testimony of the Plaintiff, Seckel Bronner, who had sworn that he refused to sell the goods to Lowenstein, and that Nathaniel Bishop had, at that time, told him not to trust Lowenstein, because he was not responsible. The said Bishop was then called by the Plaintiffs as a witness, and was asked to state whether he knew, when Lowenstein came there, anything concerning his responsibility, and if so, whether he made any communication on that subject to the Plaintiffs. To this question the Defendant's counsel objected, on the ground that the Defendant was not shown to be present at the time. The Court overruled the objection, and allowed the question to be put, and Defendant's counsel excepted.

The witness answered as follows: "I did think I knew his responsibility, and I told Mr. Bronner I would not trust him, unless he would give security. He was owing me a large amount at that time."

In deciding the question raised by the exception, we are confined to a consideration of the question, without reference to the answer given, because the answer is not responsive to the question. The answer called for by the question was a simple "yes" or "no." It was merely preliminary to another question, which might have called for what the witness told the Plaintiffs on the subject of Lowenstein's responsibility.

The Court could not know, when ruling upon the question, that anything more than "yes" or "no" to it was called for, and it must be deemed to have made the ruling with that view. The objection that the Defendant was not present at the time inquired

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about, is not pertinent, and was properly overruled. But if the question had gone further, and called for the communication made to the Plaintiffs on the subject, I think it would have been admissible. As the evidence then stood upon the issue whether the goods were sold to Lowenstein or to the Defendant, there being a conflict on that subject, and upon the collateral and pertinent fact, whether the Plaintiffs were willing to trust Lowenstein, and even whether they knew him to be irresponsible, it was undoubtedly competent for the Plaintiffs to give further testimony on that subject.

The fact that the Plaintiffs knew Lowenstein to be untrustworthy, was one which it was proper the jury should know and consider in weighing the balanced testimony upon the question whether they did trust him. And so it was proper to show that they were informed of that fact by Bishop, or any other person who knew it; and the objection that the Defendant was not present when the communication of that fact was made to them, presented no reason for its exclusion (1 Greenl. Ev. §§ 101, 108). In both points of view, therefore, the objection was properly overruled.

The Defendant, upon the trial—after it had appeared that the Plaintiffs, in November, 1857, had made a general assignment to Moses Bronner, and that in March, 1858, after they had procured a settlement with their creditors, Moses Bronner had reassigned to them the assigned property, including the claim in question—produced a bill of sale of the demand in question to Joseph Lowenstein, purporting to have been made by Moses Bronner, assignee, on the 1st day of December, 1857, in consideration of four notes, payable at two, four, six, and eight months.

This bill of sale, it was shown, was not executed by Moses Bronner in person, nor with his knowledge or consent, and that he, upon its being made known to him, repudiated it, and delivered back the notes to the agent of Lowenstein, who had procured the paper to be executed. This agent testified that he endorsed the first note, and when he got it back, tore his name off, and that he supposed it was destroyed, though he did not know.

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Samuel Lowenstein, as a witness, testified as to the notes, that after the assignment to Joseph Lowenstein he saw the first one in a banking-house in Rochester. The Defendant's counsel asked him, "By whom was the note you saw in Rochester endorsed?"

This question was objected to by the Plaintiffs' counsel, on the ground that the loss of the note was not proved, and it was not shown to be in Plaintiffs' possession.

The Court sustained the objection, and the Defendant excepted.

It is insisted by the counsel for the Defendant that the evidence was competent, as tending to show that the assignee did not return the notes, but kept them until due, and so ratified the sale of the claim in suit, and that the proof of the destination of the notes was sufficient to entitle Defendant to the evidence.

I do not think the Defendant made a case entitling him to the evidence. In the first place, as there was no offer to show, or suggestion, that the assignee was the endorser, it did not appear to be material to inquire by whom the note was endorsed; and though the objection was not on that ground, it was no error in the Court to exclude immaterial evidence upon its own motion, although no objection was raised by the opposite party (Cooper v. Barber, 24 Wend. 105). Again, there was no sufficient evidence of the loss or destruction of the note. Fulda, the agent to whom it was returned, had made no search for it, and did not know that it was destroyed. Nor was it shown that it was not still in the banking-house in Rochester. It was not competent, therefore, to give parol proof of the endorsement.

The only other point now insisted upon by the Defendant's counsel is, that there was no sufficient proof of the absence of the witness Fulda, at the time of the trial, to authorize the admission of his deposition, taken conditionally under the statute. It was proved that Fulda resided out of the State; that he was in the habit of visiting the city of New York, where the action was tried, two or three times a year, and remaining but a single day; that when he was in the city he made the place of business of the witness called to prove his absence, his headquarters, and that the witness had no knowledge or intimation of his then being in

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town. That his last place of business, when he lived in New York, was with a Mr. Waller, and that the witness had, on the morning of the trial, been to Waller's to ascertain whether he was there, and found that he was not.

And that Fulda, when applied to to attend the trial, had said his business would not admit of his absence a week or two attending on the trial. There was no evidence tending to show that he was in the State, and clearly the evidence of his absence was primâ facie sufficient.

I can see no ground for reversing the judgment, and am of the opinion that it should be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THE PEOPLE EX REL. THE NATIONAL BROADWAY BANK, APPELLANTS, v. JOHN T. HOFFMAN, MAYOR, &c., AND OTHERS, RESPONDENTS.

United States Securities—Certificates of Indebtedness not exempt from local Taxes.

Certificates of indebtedness, issued in pursuance of the Act of Congress of March 1, 1862, are not exempt from taxation by State or municipal authority.

A Congressional declaration of exemption from taxation adds no force to that which is the subject of constitutional exemption. Whatever subject is constitutionally exempt from taxation, is so without legislative declaration, and a legislative declaration of exemption of subjects not constitutionally exempted, is of no validity.

John E. Burrill for Appellants.
R. O'Gorman for Respondents.

HUNT, J.—On the 30th April, 1866, the Legislature passed an act authorizing and directing the Board of Supervisors of the county of New York to refund to any bank which may have paid taxes in that county, for the years 1863 or 1864, such an amount of said tax as was imposed or levied upon said bank in respect to any portion of its capital stock invested in securities of the United States, by law exempt from taxation; and for this purpose to cause to be issued county bonds, signed, sealed, and attested, as thereby required, for the amount of the claim of such bank, after it should have been audited and allowed by said board, and approved by the Mayor and Corporation Counsel (Laws 1866, vol. 2, page 1996).

The Broadway Bank having paid such tax, presented its claim to the board, and the same was audited and allowed at the sum of $53,132.31, as of May 1st, 1866, and such auditing and allowance was approved by the Mayor and Corporation Counsel, and bonds for that amount were ordered by the board to be issued to said bank.

In pursuance of an ordinance of the said board, passed January 7th, 1867, county bonds in the form prescribed by the said act of

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April 30th, 1866, and said ordinance, were prepared, and ready to be signed, sealed, and issued to the said bank; but the Defendants refused to execute or deliver the same.

The ground of this refusal is, that a portion of the capital stock of the Broadway Bank, on which the aforesaid taxes of 1863 and 1864 were levied, was invested in certificates of indebtedness, issued under the act of Congress of March 1st, 1862; and the Defendants claim that such certificates are not securities of the United States by law exempt from taxation, and that it had been so adjudged by a branch of the Supreme Court since the decision of the Board of Supervisors. The General Term of the First District held that the certificates were liable to taxation. The Plaintiffs appealed from that judgment to this Court. Certificates of indebtedness under the act of Congress of March 17th, 1862, were held by other banks, and were presented for decision in the same judgment.

Certain evidences of debt against the United States are authorized by the U. S. statutes, to which I will presently refer, which it is claimed are exempt from taxation by State authority.

The exemption is claimed on two grounds: first, of the express declarations of the United States statutes to that effect; secondly, that they are instrumentalities of the United States government, necessary to the administration of its affairs, and for that reason not liable to taxation by the authority of the State.

The statutes in question are those of March 1st, 1862 (vol. 12, p. 352, U. S. Statutes at Large), and March 17th, 1862 (p. 370, same vol). By the act of March 1st the Secretary of the Treasury was authorized "to cause to be issued to any public creditor who may be desirous to receive the same, upon requisition of the head of the proper department, in satisfaction of audited and settled demands against the United States, certificates for the whole amount due, or part thereof, not less than one thousand dollars; which certificate shall be payable in one year from date, or earlier, at the option of the Government, and shall bear interest at the rate of six per centum per annum."

This act is entitled, "To authorize the Secretary of the

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Treasury to issue certificates of indebtedness to public creditors." It assumes the existence of a creditor, and of an audited demand against the United States. It authorizes a certificate of indebtedness to be given to him, payable one year from date, or earlier, if he shall be desirous to receive the same. It is a provision for extending for one year the recognized and admitted demand of a public creditor. It is in no sense a borrowing of money. The debt already existed, had been audited by the proper bureau, and the arrangement under consideration was for time merely. The act of March 17th (p. 370) provided that the Secretary of the Treasury might issue "certificates of indebtedness" such as are authorized by an act (above referred to), to such creditors as may desire to receive the same in discharge of checks drawn by disbursing officers upon sums placed to their credit upon the books of the treasurer, upon requisitions of the proper departments, as well as in discharge of audited and settled accounts, as provided by said act.

The latter act possesses the same elements, and no others, than the one before referred to; simply extending the authority to issue the certificates to a different class of creditors—those who held checks drawn by disbursing officers. The Secretary is authorized by these acts, in the event that certain public creditors shall desire it, to issue to them certificates that the government is so indebted to them; which certificates, it is enacted, shall bear an interest of six per cent., and shall entitle the government to a credit of one year or less, at the option of the government.

I will now refer to those statutes which declare that the bonds and other securities of the United States shall be exempt from State taxation, under which exemption is claimed for their certificates. These declarations commenced with the act of Feb. 25th, 1862 (vol. 12, p. 345, § 2), and, so far as I am able to discover, end with the act of March 3d, 1865. As we know from historical information, as well as by a reference to the statutes of the United States, the government has been a borrower of money, at intervals, from its organization. But without going further back, I have now before me the statute of July 12th, 1841, authorizing a loan

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of $12,000,000, and the issuing of stock therefor; the act of April 15th, 1842, authorizing an additional loan of $5,000,000, in the same manner; the act of July 22d, 1846, authorizing the issue of treasury notes to the extent of $10,000,000, or the issuing of stock in lieu thereof; the act of January 28th, 1847, authorizing the issuing of $23,000,000 of treasury notes; the act of February 8th, 1861, authorizing the loan of $25,000,000, and the issuing of stock therefor; the act of March 2d, 1861, authorizing a like loan of $10,000,000; and the act of July 17th, 1861, authorizing the issue of $250,000,000 of treasury notes. Neither of these acts contain the declaration that the securities issued under them should be exempt from State taxation. The first act in which this provision is found is that of February 25th, 1862 (vol. 12, p. 345, § 2), authorizing the issue of $150,000,000 of United States treasury notes, payable to bearer at the treasury of the United States, of the denomination of five dollars, and providing that $50,000,000 should be in lieu of the demand notes authorized by the act of July 17th, 1861; providing further, that the notes thus issued should be receivable in payment of all taxes, except duties on imports, and should be a legal tender in payment of all "public and private debts, except duties on imports, and interest as aforesaid." The next section of the act, in order "to enable the Secretary of the Treasury to fund the treasury notes and floating debt of the United States," authorized the issue of bonds, commonly called five-twenties, not exceeding five hundred millions of dollars, bearing six per cent. interest. The Secretary was further authorized to dispose of such bonds for coin or treasury notes, or notes issued under the provisions of this act; and it was then declared that all stocks, bonds, and other securities of the United States, held by individuals, corporations, or associations within the United States, shall be exempt from taxation by or under State authority. The next provision of this kind is in the act of March 3d, 1863 (vol. 12, p. 709), authorizing the Secretary of the Treasury to borrow $600,000,000 on bonds of the United States, and to issue $400,000,000 of "treasury notes," bearing six per cent. interest, and $150,000,000 of "United States notes," without interest, which shall be

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legal tenders; "and all the bonds and treasury notes, or United States notes, issued under the provisions of this act, shall be exempt from taxation by or under State or municipal authority."

The next declaration of exemption is found in the act of March 3d, 1864 (vol. 13, p. 13), authorizing the issue of $200,000,000 of five-forty bonds, bearing an interest of five per cent., where it is declared that "all bonds issued under this act shall be exempt from taxation by or under State or municipal authority."

And again on the 30th of June, 1864 (vol. 13, p. 218), the Secretary was authorized to borrow four hundred millions of dollars; to issue therefor bonds, bearing an interest of six per cent.; and it was declared that "all bonds, treasury notes, and other obligations of the United States, shall be exempt from taxation, by or under State or municipal authority."

And again, by the act of January 28th, 1865, the act last mentioned was amended, by authorizing, in lieu of the bonds authorized by the first section of that act, treasury notes of the description authorized in the second section thereof; and after making certain provisions for the disposal of the same, it was enacted that "such notes shall be exempt from taxation by or under State or municipal authority."

The only remaining declaration is found in the act of March 3d, 1865, by which the Secretary was authorized to borrow $600,000,000, and to issue therefor bonds, or treasury notes, in such form as he may prescribe, bearing an interest not exceeding six per cent. The second section prescribes the manner in which the "bonds or other obligations issued under this act" shall be disposed of, and concludes in these words: "and all bonds or other obligations issued under this act shall be exempt from taxation by or under State or municipal authority."

Before commenting upon these statutes, a reference to the principles upon which the bonds of the United States have been adjudged to be exempt from State taxation will be advantageous. McCulloch v. The State of Maryland (4 Wheat. R. 316) is among the earliest on the subject. The Supreme Court of the United States there decided that Congress had the power to incorporate a

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United States Bank; that the bank had the constitutional right to establish its branches of discount and deposit within any State; that the taxing such branch office by a State was retarding and burdening the operations of laws passed to carry into effect the powers of the government, and therefore unconstitutional. The bank and its branches are held to be "an instrument employed by the government in the execution of its powers," and no more liable to taxation than the mail, the mint, the custom-house papers, or judicial process of the United States. That the tax was "upon the operation of an instrument employed by the government of the Union to carry its powers into execution." It was expressly stated (p. 436): "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is consequently a tax on the operations of an instrument employed by the government of the Union to carry its powers into execution."

In Osborn v. The United States Bank (9 Wheat. R. 738), the Supreme Court of the United States was asked to reconsider its opinion in the case of McCulloch v. The State of Maryland (supra), so far as it decided that the States had no rightful power to tax the Bank of the United States.

Upon such reconsideration the former decision was sustained, and upon the same general grounds as before set forth.

In Weston v. The City of Charleston (2 Peters' R. 449), the city of Charleston had imposed a direct tax of twenty-five cents upon the hundred dollars, on the six and seven per cent. stock of the United States. An injunction was obtained against its collection, and the question of the legality of the tax was presented to the Supreme Court of the United States. The Court held the tax to be unconstitutional, saying: "The tax on government stock is thought by this Court to be a tax on the contract, a tax

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on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution."

In Dobbins v. The Commissioners of Erie County (16 Peters' R. 435), the Plaintiff was assessed by the State authorities upon his office of captain of a revenue cutter of the United States, and the question was submitted to the Court upon the legality of such taxation. The statute of Pennsylvania authorized an assessment "upon all offices and posts of profit."

The Court held the taxation to be illegal, upon the ground that the officer, like the vessel he commanded, was "a means to carry into effect the object of the government," and no more liable to taxation than the vessel.

In the Bank of Commerce v. New York City (2 Black, 620), the doctrine of Weston v. The City of Charleston was reiterated and affirmed; and it was held that "a State tax on the loans of the Federal government is a restriction upon the constitutional power of the United States to borrow money," and thus unconstitutional.

It is evident from these cases that a stock or bond of the United States, issued upon a loan of money to the government, is none the more exempt from taxation on account of a declaration to that effect in the act of Congress authorizing the issue. The exemption is constitutional, and not legislative.

Whatever the Constitution exempts is exempt, although the act of Congress is silent upon that point. Whatever the Constitution does not make exempt, it is beyond the power of Congress to exempt, however numerous or explicit may be its declarations. Thus the stocks declared to be exempt in Weston v. The City of Charleston contained no express clause of exemption. The same is true of the stocks which are the subject of inquiry in what are called the tax cases (The People v. Commissioners of Taxes, 23 N. Y. 197; 2 Black, 620). So of the United States Bank and its branches, and so of the salary of the revenue officer. In each case the exemption is placed upon the express ground that the subject taxed was a means or power of the United States, necessary or useful in carrying on the operations of

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the government. Such means or instruments cannot be taxed, not because Congress declares that they shall not be taxed, but because they are parts of the operations of the government, which the Constitution declares must not be burdened or impeded. The large loans authorized by Congress, by three several laws, during the year 1861, are none of them, in terms, exempted from State taxation. They are, however, as effectually shielded by the Constitution as if the strongest words had been employed to announce such exemption. Congress may determine what are the suitable means to carry on the government, and when so declared, whether in the form of a bank, a mail, or a loan of money, such means, ipso facto, are exempt from taxation. On the other hand, it is plainly beyond the power of Congress to exempt from taxation any subject or matter, within the territory of a State, that does not come within the principle of the exemption, as I have stated it. In the language of Judge Wayne, in Dobbins *v.* The Commissioners of Erie County (sup.), in reference to the powers of the State: "Taxation is a sacred right, essential to the existence of government; an incident of sovereignty. The right of legislation is coextensive with the incident, to attach it upon all persons and property within the jurisdiction of a State. But in our system there are limitations upon that right. There is a concurrent right of legislation in the States and in the United States, except as both are restrained by the Constitution of the United States. Both are restrained by express prohibitions on the subject, and the States by such as are necessarily implied when the exercise of a right by a State conflicts with the execution of another sovereign power delegated to the United States. Taxation is a sovereign power in a State; but the collection of revenue upon imported goods, and the regulation of commerce, are also sovereign powers in the United States."

"It is so ample that it may be exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it." "There is no limit in the exercise of the right, no guard against the abuse of power, but in the structure of the government, and the discretion of the representatives

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of the people." "It is not confined to the people and property of the State; it may be exercised upon every object brought within its jurisdiction" (Penrose, arguendo, p. 438, citing numerous cases). It is only when a subject is within the express prohibition of the Constitution of the United States, or when it is a means of carrying on that government, that it can be relieved from its obligation to bear its portion of State taxation. I look upon the Congressional declaration of exemption as of no legal effect, but doubtless of service, in carrying upon the face of the authority to borrow an evidence of exemption which, with the uninformed or the unreflecting, would give greater facility in obtaining the desired loans.

Nor do I consider it by any means certain that the declaration of exemption was intended to apply to the certificates in question. The very frequency of its repetition, and the generality of its terms, afford evidence to the contrary. Thus, in the act of February 25, 1862, authorizing the issue of $150,000,000 of treasury notes, and of $500,000,000 of bonds to fund the treasury notes, it is declared that "all stocks, bonds, and other securities of the United States, held by individuals, corporations, or associations within the United States, shall be exempt from taxation by or under State authority."

This is claimed to cover the certificates now under consideration, although they were issued afterward. Upon the same argument, however, it would protect all the bonds, and security of every kind, afterward provided for by Congress. Why, then, should the six separate declarations of exemption which I have quoted have been made in the acts of Congress? Upon this construction they are simply absurd; while upon the legal principle that, although general terms are used in a contract or a statute, they are to be restricted in their application to the subject-matter in hand, the repetition is sensible and intelligible. This idea is sustained by the difference of language in the different statutes. Thus, the language last quoted is general, while in the act of March 3d, 1863, it is declared that "the bonds, treasury notes, and United States notes, issued under the provisions of this act," shall be

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exempt; limiting the exemption to the issues then authorized. So in the acts of March 3d, 1864, of January 28th, 1865, and of March 3, 1865, the exemption is confined to "all bonds issued under this act," or equivalent words; while in the act of June 3d, 1864, the language includes all bonds, treasury notes, and other obligations of the United States.

I think this language is to be applied, in each case, to the issues authorized by the acts in which it is found. It will be observed that the act authorizing the issue of the certificates now under consideration contains no declaration of exemption; and unless they are to be exempt upon the ground that they are the means and instruments of the general government, necessary to its operations, they must come within the general scope of State taxation. I do not think they are such. The money or materials, or whatever may have been the original consideration of the indebtedness in question, had been previously received by the government. The certificates were not issued to obtain either money or materials, but were to be issued as a means of payment, at a subsequent day, for what had already been received and spent by the government. They cannot come under the head of "borrowing money," which was the theory upon which the constitutional exemption was declared by the Supreme Court of the United States; nor can they be deemed a means necessary to the operations of the government, like ships, a bank, the mail, the custom-house, and the like. They are simply claims of a creditor against a debtor, and against a debtor who is not liable to prosecution, and who could not, like an individual, be embarrassed by a seizure of his property. The certificates do not show upon their face what was the consideration of the original indebtedness, nor is there any evidence upon that subject. They simply show an indebtedness, which has been audited and allowed, and which the government has promised to pay.

This Court should acquiesce fully in the decisions of the Supreme Court of the United States upon questions arising under the laws and Constitution of the United States.

While I do this cheerfully, I am of the opinion that exemptions

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like those under consideration should not be extended, but should be limited to the cases decided, or to those falling necessarily within their principles. That Court has decided that to tax a loan of the United States is an interference with the constitutional power of the Federal government to borrow money, and therefore illegal. In this we acquiesce. It has also decided that the means and instruments of the government necessary for carrying on its operations cannot be impeded or burdened by State taxation. Upon this principle the United States Bank, the custom-house, its vessels, munitions of war, post-offices, and the immediate property or functions of that government, cannot be taxed by the States. It has never been decided, however, that a certificate or statement of a past indebtedness, which is property in the hands of a citizen, and in relation to which there is no evidence of the original consideration, and which has never been declared by Congress to be such, is to be deemed as a matter of law a necessary instrumentality of the government, and thus exempt from taxation.

There is no particular virtue in the written statement or certificate. It simply affords ready proof of the debt, but does not alter its character. And yet it would hardly be contended that if the government had years before purchased property of an individual, for which it yet owed the purchase-money, but had given no certificate or evidence of the debt, that this should not, for the purposes of taxation, be deemed a part of the estate or effects of the seller, and liable to taxation, as much as if the purchase had been made and the money owed by an individual. The present case is in legal effect the same.

I see no reasonable ground upon which the exemption under consideration can be claimed; and, considering the enormous taxation to which the people of this State are subject, and must continue to be subjected, it would be unwise, if we could do so, to exempt from its power of taxation any property upon which it has a legal hold.

The Courts have no such power. Their duty is merely to declare the law.

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In my opinion the General Term was right in holding these certificates to be liable to taxation, and their judgment should be affirmed.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THE PEOPLE EX REL. THE BANK OF NEW YORK, v. THE BOARD OF SUPERVISORS OF THE COUNTY OF NEW YORK.

United States Securities—Legal Tender Notes not exempt from Local Taxes.

Legal tender notes, issued under the Act of Congress of February 25, 1862, are not exempt from State or municipal taxation.

Wheeler H. Peckham for Appellants.
R. O'Gorman for Respondents.

HUNT, J.—This case presents the same general questions as are involved in the case of the Broadway National Bank.

My opinion in that case examines the question fully, and I refer to it as expressive of my views of this case.

I have there endeavored to show that a Congressional declaration of exemption is of no effect; that it is the Constitution, and not the law, which gives the exemption.

I have endeavored also to show that certificates of indebtedness are not within the spirit of any of the decisions exempting public loans from taxation.

Upon the same principles I am of the opinion that legal tender notes are not exempt from State taxation; that they are not loans to the United States, and that there is no declaration of Congress requiring their exemption.

They are in no sense loans or the representatives of loans. They are currency—the medium by which purchases are made, or debts are paid, involving no idea of borrowing or lending.

If A buys of B a house or a horse, and pays him the price thereof in bank-notes, is there any view in which A can thereby be made a borrower of B? The government occupies simply the position of a payer, or of a purchaser, with reference to these notes.

Legal tender notes are money, expressly declared to be "lawful money and a legal tender in payment of all debts, public and

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private," except duties on imports, and are to be "reissued from time to time as the exigencies of the public interests shall require." They are to all intents and purposes "money" in the hands of banks and individuals.

They are neither loans to the government, nor are they its instrumentalities necessary for carrying on its affairs. After they are issued by the government they are the circulating medium of the country, used by individuals, in and for the ordinary transaction of their affairs, as private property, and with no reference to the wants or the conveniences of the government.

The government issues eagles, half-eagles, and dollars, as well as legal tender notes, and for the same purposes. It is indispensable to the carrying on the affairs of government that it should possess the power to coin and to issue this money; but no one will contend that it is exempt from taxation, after it has reached the hands of individuals, or that when it has entered into the circulation of the country it is to be regarded as an agency of the Federal government. The principle is the same, as to the paper money issued by it.

Nothing can be more unreasonable or impracticable than the idea of exempting money thus in circulation from State or municipal taxation.

Nor do I find any express declaration of Congress that these legal tender notes shall be exempt from taxation.

In giving an interpretation to the language of these acts, it is to be borne in mind that there are many kinds of obligations to which the language may be applied.

There are coupon and registered bonds, authorized by numerous acts. There are treasury notes, payable three years from date, bearing an interest of seven and three-tenths per centum per annum; and treasury notes not bearing interest, but payable on demand, at the Assistant Treasurer's office in New York, Boston, or Philadelphia (not being legal tenders); and treasury notes payable in one year, bearing an interest of three and sixty-five-hundredths per centum, and certificates of indebtedness, and compound interest notes, payable with six per cent. interest. We thus have

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bonds or stocks, technically so called, certificates of indebtedness, treasury notes at different times, and different rates of interest, and United States demand notes, in addition to legal tenders.

In various acts, passed since 1862, authorizing the issue of bonds, it is expressly declared that the bonds shall be exempt from taxation.

So when treasury notes are authorized, they are expressly declared to be so exempt; but in the act authorizing the issue of legal tender notes (Feb. 25, 1862), the words do not seem to be intended to embrace their exemption. The first section of the act authorized the issue of $150,000,000 of treasury notes, of a denomination of not less than five dollars each, which it declared should be legal tender in payment of debts, and should in substance be the money of the United States.

If these notes had been intended to be exempted, the section in which they were authorized would have been the natural place in which to look for the declaration to that effect. We do not find it there.

The next section authorizes the emission of $500,000,000 of six per cent. bonds, for the avowed purpose of funding the treasury notes and floating debt of the United States.

These bonds the Secretary is authorized to dispose of at their market value; and in the same sentence, delayed only by a semicolon, is the statement that all stocks, bonds, and other securities of the United States shall be exempt from taxation.

I think the fair construction of this exemption would limit it to the bonds and stocks in that section referred to, or at the most that the "other securities" intended to embrace other like securities, or other bonds and stocks by other acts authorized to be issued. This view is strengthened by the fact that in all the other acts, as I have before stated, the notes intended to be exempted are referred to, and exempt by name.

The same construction may be given to the act of June 30, 1864, which is the only other act containing general words of exemption.

By that act the Secretary was authorized to borrow $400,000,000

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upon the credit of the United States, and to issue bonds therefor, and to issue $200,000,000 of treasury notes, both of said securities bearing interest and payable at a future day; and it was enacted that "all bonds, treasury notes, and other obligations of the United States shall be exempt from taxation." This also, in my judgment, should be limited to the subject-matter of the act, to wit, bonds and treasury notes, or at the most to the other bonds and treasury notes of the various kinds I have mentioned, which might be deemed "other obligations" of a like character.

If it had been intended to exempt legal tender notes, apt words to describe them would have been used, or the notes in the act referred to would have been specified.

It is inconceivable that Congress should have continued to repeat and reiterate this exemption on six different occasions, if the acts of February 25, 1862, and of June 30th, 1864, were intended to embrace all the securities or obligations of the United States in all imaginable forms.

In my opinion such legal tender notes are not exempt from State taxation.

There may be a distinction as to the statutory declaration, in reference to the small quantity of notes issued under the act of March, 1863.

The language is there more specific than in the act of February, 1862. It does not appear that any of the notes in question were issued under that act. It would not affect the general principle of non-exemption which I have discussed if it had so appeared.

The judgment of the General Term should be affirmed.

GROVER, J.—The question in the present case is whether the notes of the United States Government, declared by Act of Congress a lawful tender in payment of all private debts, and thus, if the act be valid, made money to all intents and purposes, are liable to State taxation in common with the other property of its citizens.

In the Metropolitan Bank against Van Dyck the act was held constitutional by a majority of this Court, and, consequently, valid.

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However erroneous this decision may be regarded, and although the reasoning upon which it was founded entirely fail to satisfy the mind of its soundness, yet it has been acquiesced in and acted upon as a correct exposition of the power of Congress, and, as a consequence, these notes have become almost all the lawful money in circulation, and were so at the time the taxes in question were imposed.

It must therefore be held, for the purposes of this case, that such notes are lawful money to all intents and purposes.

The question comes to this Court, whether the money of the country, however so made, is exempt from taxation by the States, by the Constitution of the United States, or has been exempted by act of Congress. As an original question there could scarcely be a doubt entertained upon either proposition. I think no clause or provision of the Constitution can be found that by any possible construction gives the slightest color to the idea that the money of the United States, belonging to a citizen of the State, cannot be taxed by the State in common with the other property of the citizens of the State.

No such clause or provision is pointed out, or even suggested, in the able argument of the counsel for the Appellant.

None such has ever been suggested by any jurist, or commentator upon the Constitution.

Money has been taxed in common with other property by the States, ever since the organization of the government; and the right so to tax has never been questioned, until the introduction of the particular kind of money in question.

It may, therefore, be assumed as a clear proposition, that the State has a perfect right to tax money. But it is insisted that, notwithstanding these notes are lawful money, and as such liable to taxation, they are also evidences of debt owing by the government, and as such exempt, the same as the bonds of the government, or the stocks of the government, evidenced in any way whatever.

It is perhaps a sufficient answer to this position that the exemption is claimed by the Appellant, and that the onus is upon him

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to show that the notes possess no quality subjecting them to State taxation. If they possess any quality rendering them liable, such liability is not discharged by showing that they possess some others that do not so render them. They are taxable as money, under the Constitution, so long as they possess this quality, and whether they are as notes of the government it is not material to inquire; should they be held not taxable as notes, they become taxable as money, when this quality is superadded.

A law exempting almost the entire mass of the money of the country from all obligation to contribute to the support of the State government, by which it is provided almost exclusively, would be anomalous indeed.

The idea that they were creating such exemption never occurred to the framers of the Constitution, or to those who adopted it, or some trace of such an idea would be found in the discussions growing out of these transactions.

It is claimed by the counsel of the Appellant, that, although not exempt by the Constitution, they are made so by act of Congress.

Before examining the acts cited from which such exemption is claimed, it is proper to inquire whether Congress has any power, under the Constitution, to exempt any property of a citizen of a State from taxation, in common with the property of the other citizens of the State, to support the State government.

This power, if it exists, is one of vast importance to the States, as is shown by the present case, and should be found either among the express powers delegated, or clearly implied from some of those powers.

The right of taxation by the States, of the property of their citizens, is one essential to their existence, and such right would never have been delegated to any other government, or subjected to its control, without the greatest necessity therefor.

No such delegation is found among the express powers. If to be implied from any such, it is the power to borrow money on the credit of the United States.

How this power to borrow money confers any power upon

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Congress to interfere with the taxing powers of the State, it is difficult to discover. This, like all the other delegated powers, is supreme, and no State has any power to interpose any obstacle to its free exercise; and any act of a State creating such obstacle would be void.

This would render void all schemes of taxation discriminating against loans of or to the government, as such schemes would clearly tend to embarrass the free exercise of the power to borrow money. Such schemes would be held void, and thus defeated by the Judiciary.

There is no necessity for the intervention of Congress in such cases. But taxing loans to the government at the same rate of loans to the State or other loans—in short, at the same rate that all other property is taxed—has no such tendency. This leaves the Federal Government free and unobstructed access to the money markets of the State for the purpose of borrowing, and the grant of power does not contemplate anything more than this. It is true that exemption from taxation by the States will enable the government to borrow money upon more favorable terms, but this is no argument in support of a power in Congress to exempt the loan from taxation, any more than of a power to prohibit States, corporations, and individuals from competing with the government when the latter wishes to borrow, or exercising the power of determining the rate of interest that others may pay, so as to enable the government to borrow at a legal rate of interest.

It is not enough to warrant the assumption of an implied power by Congress, to show that such power would in some way incidentally aid in the execution of an express power, when the power implied includes matters clearly beyond the control of Congress, except for such incidental aid. Otherwise the power of Congress would only be limited by the express prohibitions found in the Constitution, and the idea that their legislation, to be valid, must be based upon the expressly delegated powers, or upon such implied powers as are necessary and proper to a full execution of the express powers, has no practical force.

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There can be no act passed by Congress, of which it may not be shown that in some way it would the better enable the government to execute some express power. The General Government must borrow money upon its own credit, and at its own expense. It has no power to borrow upon the credit or at the expense of the State governments, and, consequently, has no right to reduce the interest upon its loan by depriving the States of their power of taxation.

This power of the States rests upon a firmer basis than that of contract entered into by the General Government. The argument that Congress may exempt its loans from State taxation, because it could thereby borrow money upon better terms, carried to its full extent, would authorize it to exempt from like taxation all products and commodities the government may require in its service, either in peace or war, and all capital employed in such production, for the reason that government could thereby procure such articles more readily, and at less cost, and thereby be the better able to carry on war. All such reasoning is fallacious, and although, in certain conditions of the country, some patriotic and able minds have partially yielded it their assent, yet a thorough, calm examination will show its results equally disastrous, ending in a consolidation of all power in the Federal Government; as the opposite extreme, ending in State secession. My conclusion is that Congress has no power to pass a law exempting any property from its liability to State taxation.

It is therefore unnecessary to determine whether the notes or bills come within any of the acts declaring such exemption.

I am aware that the Federal Supreme Court, in Weston v. The City of Charleston, decided that the stocks of the United States are, by the Constitution, exempt from State taxation; that the same doctrine was again affirmed by the same Court in Bank of Commerce v. The Tax Commissioners (2 Black, 620). The reason assigned was, that if such stock was liable to taxation under State authority, it would be in effect a tax upon the credit of the United States, and that the States could by taxation impair or destroy the power of the government to borrow money.

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If the reasons are sound, the conclusion is manifestly correct. But are they sound? As to the first, it is not a tax upon the property of the citizen, which consists of a debt due from the government. It is this property that is taxed, not government credit. Where debts due from individuals are taxed, it is the property of the creditor, not the credit of the debtors, that is taxed. Credit is never the object of taxation, but property is. Liability to State taxation does not destroy or impair the power of borrowing, as is abundantly shown by the vast amounts borrowed by States, corporations, and individuals, subject to such liability.

The Federal Government itself imposes a tax upon incomes exceeding a given amount, and collects, unchallenged, this tax from the income derived from State offices. This is undoubtedly within the powers of Congress.

The tax is not imposed upon the officer, but upon the property, irrespective of the sources from which it is derived. This tax upon income derived from the salary or fees of State officers should be clearly illegal, if the grounds upon which Weston v. Charleston was decided are sound. States clearly have the right to compensate their officers, and a Federal tax imposed upon such compensation is just as much a tax upon this right of the State, as a State tax upon a debt owing by the General Government is a tax upon its credit; and the power of the State to appoint officers is as much impaired by this exercise of Federal taxation as the power to borrow is by State taxation. But the principles of that decision are not sound. Both the Federal and State Governments have the power of taxation, and may exercise it concurrently, and neither can constitutionally interfere with the right of the other. As the powers of the Federal Government are supreme and paramount, it follows that in case the concurrent powers of taxation of the Federal and State Governments collide, the latter must yield, but in no other respect can the Federal Government interfere with the taxing powers of the States.

This question being one of construction of the Federal Constitution, the Supreme Court of the Union has jurisdiction, and, when

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it is decided by that Court, all other Courts must yield obedience to its decision, whatever the views as to its correctness may be; but, where the subordinate Court is of the opinion that such decision is erroneous, it is not their duty to follow it, except as to the precise points adjudged. As to the entire class of debts of the General Government which the Supreme Court have decided were exempt from State taxation, it is the duty of this Court to hold exempt; as to any other class not so adjudged by the Federal Supreme Court, it is the duty of this Court to decide according to its own convictions, and not pronounce any property exempt, unless its own views of the law brings it to that conclusion.

It will be seen that, according to my views, the powers of taxation of both governments must be exercised equally upon all property; that a discriminating tax imposed by either government to embarrass the other in the exercise of its powers would be unconstitutional and void.

As an instance of such an exercise of the taxing power, reference need only be made to the tax imposed by the Federal Government upon bank-note circulation, where one per cent. tax is imposed upon those issued by national banks, and eleven per cent. upon those of State banks.

This presents a palpable case of an attempt by the Federal Government to destroy banking under State authority by the exercise of the taxing power.

If this can be upheld, there is nothing that may not be destroyed by a similar exercise of the taxing power.

If this be valid, it follows that neither government can tax any revenue derived from any operation of the other government, for the reason that the tax might be carried to an extent entirely prohibitory.

But when equality of taxation is adhered to, such a result can never follow until all property is destroyed.

The judgment appealed from should be affrmed.

All concur.

JOEL TIFFANY,
State Reporter.

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MONTAGUE M. HENDRICKS AND OTHERS, EXECUTORS OF HENRY HENDRICKS, DECEASED, RESPONDENTS, v. PHILIP STARK, APPELLANT.

Contract—Specific Performance—Party-walls—Easement.

The fact that two of the walls of a building are party-walls, each proprietor having an easement in one half of the wall which stands on the adjoining premises, does not constitute such an encumbrance to the title as to excuse a purchaser of the building and premises from completing his purchase, because of the existence of such easement.

APPEAL from the Supreme Court.

The action was to enforce specific performance, by the Defendant, of a contract to purchase the premises known as the Collins Hotel, in the city of New York, for the sum of $96,000. The Appellant denied his obligation to complete the purchase, on the ground that two of the walls of the building were party-walls.

The cause was tried at Special Term, before Mr. Justice Barnard, who rendered judgment for the Plaintiffs. He found, in substance, the following facts:

1. On the 13th of June, 1839, Lispenard Stewart and Robert Stewart owned a lot on the corner of West and Hoboken streets, being eighty feet on West street, and eighty-eight feet on Hoboken street; and also owned the adjacent lots on the east and south.

2. They entered into a contract with John G. Rohr, by which he undertook to erect three or more four-story brick stores, to occupy the entire front of the corner lot on both streets; the southerly and easterly walls to be party-walls, half on the corner lot, and half on the premises adjacent; in consideration of which the Stewarts were to convey to him a part of the property.

3. Rohr sold the southerly forty feet of the lot on West street to George T. Nelson, who verbally agreed to erect the building on that part of the premises called for by the contract with the Stewarts, Rohr agreeing to build, between his lot and Nelson's,

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a party-wall, standing half on the land of each—Nelson paying half the expense.

4. Rohr proceeded to erect the stores on the portion of the premises he retained, the easterly and southerly walls being party-walls, standing half on his own, and half on the adjacent lots.

5. On the 9th day of October, 1840, the Stewarts executed the conveyance to Rohr of the premises in question, being eighty feet on Hoboken street, forty-four feet on West street, and of corresponding dimensions in the rear; and the deed provided that the owner of the lot adjoining the easterly house on Hoboken street should be entitled to use and build upon one moiety of the party-wall, or so much of it as he might require, on paying to Rohr the appraised value of such portion of it as he should use; after which it should be and remain a party-wall between such houses, belonging equally and in common to both.

6. In 1851 Rohr converted the buildings into a hotel, by adding another story, and changing the internal arrangements; and the property is now known as the Collins Hotel.

7. In 1854 the premises were conveyed by Rohr and wife to the testator Hendricks; and they were described in the deed as eighty feet on Hoboken street, and forty-four feet on West street; but no mention was made of any agreement in regard to party-walls.

8. The testator died in September, 1861, leaving a will, in which he appointed the Plaintiffs his executors and trustees, with authority to sell all his real estate at public auction, or otherwise, and to execute conveyances therefor; and the will was duly proved, and letters testamentary issued to the Plaintiffs.

9. The premises were accordingly advertised for sale in February, 1866; the following being the description in the auctioneer's notice: "West street, south-east corner of Hoboken street, Collins Hotel, opposite Albany steamboat landing, 44 x 80 feet."

The conditions of sale provided for payment of half the purchase-money of a conveyance, and a bond and mortgage for the balance of the price, to be delivered at the office of Messrs. Cambreling & Pyne, on the 25th of April following. The following clause was also inserted in the conditions of sale: "The dimen-

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sions of all the property is more or less. The usual executors' deed will be given."

10. The Defendant purchased at the auction sale for $96,000; and he signed the following memorandum at the foot of the conditions of sale:

"I have this thirteenth day of February, 1866, purchased the premises on the south-east corner of West and Hoboken streets, for the sum of ninety-six thousand dollars, and hereby promise and agree to comply with the terms and conditions of the sale of said premises as above mentioned and set forth, said premises being known as Collins Hotel.

"PHILIP STARK."

The Defendant, on that and on the following day, paid ten per cent. upon the purchase.

11. The premises known as "Collins Hotel" are the same formerly owned by Rohr. The walls on the east and south are party-walls, and have been used as such for twenty-seven years. They were intended to be built so that the centre of each wall should be on the boundary line; but the centre line of the southerly wall is in fact an inch south of a line parallel with Hoboken street and forty-four feet southerly therefrom.

At the time of the purchase, subscription, and payment of the ten per cent., the Defendant had no knowledge that the walls were party-walls.

12. The Defendant subsequently elected and agreed, pursuant to the conditions of sale, to give a bond and mortgage for half the purchase-money. The Plaintiffs, at his request, prepared them, and affixed the stamps, of the value of $58, and he executed them, but did not deliver them to the Plaintiffs.

13. The sum of $19,200, being twenty per cent. on the purchase, which became due on the 21st of March, 1866, has never been paid.

14. The Plaintiffs, prior to the 25th of April, 1866, prepared a conveyance of the premises, affixed the necessary stamps, of the value of $96, and submitted it to the Defendant for inspection; and the deed was approved by him as to form.

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15. On the 25th of April they tendered the deed to the Defendant, in conformity with the terms of sale, but he refused to receive it, and has neither paid the balance of the price, nor delivered the bond and mortgage.

16. The damages, by way of expenditures, sustained by the Plaintiffs, by reason of the Defendant's refusal to perform, have been settled by the parties at $1,199.60.

The conclusions of the Judge were:

First. That the party-walls did not constitute such an easement or encumbrance on the premises, or defect in the title thereof, as should relieve the Defendant from his contract, or entitle him to compensation.

Second. That the dimensions of the premises having been expressly stated in the terms of sale as more or less, the existence of the party-walls does not constitute such a variance in the dimensions of the premises agreed to be sold as to relieve him from the purchase, or entitle him to compensation.

The appropriate judgment having been rendered, and affirmed at the General Term, the Defendant appealed to this Court.

Wheeler H. Peckham for Appellant.
William M. Evarts for Respondents.

PORTER, J.—Upon the facts found by the Judge, the Plaintiffs are clearly entitled to the relief demanded in the complaint, and awarded in the Court below. As trustees under the testator's will, they were the proprietors of the premises known as the "Collins Hotel." These premises extended, in fact, as well as in law, to the central lines of the respective party-walls; which substantially corresponded with the specified dimensions of the lot, and with its eastern and southern boundaries (Eno *v.* Del Vecchio, 4 Duer, 61; Sherred *v.* Cisco, 4 Sandf. 480; Thompson *v.* Somerville, 16 Barbour, 473; Partridge *v.* Gilbert, 15 New York, 614). There was no assertion of title beyond these lines, either in the notice of sale or in the contract signed by the Defendant. The practice of economizing space in populous cities, by the erection of buildings with party-walls, is one so ancient that it would be difficult

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to trace its origin. The law applicable to this subject has been for centuries well settled in England; and the prevalence of a like usage in our larger towns has made the rules which govern it equally familiar here.

There was nothing in the description of the premises in question as the "Collins Hotel" which imported, ex vi termini, that the walls were of this or of a different character. The failure of the Defendant to inform himself, on a subject as to which the notice of sale was silent, indicates his indifference as to the particular character of the walls, and shows that he was content to buy without being at the trouble of examination or inquiry. This omission may be evidence of his own indiscretion and incaution; but it cannot be imputed as a wrong to the Plaintiffs, who neither said nor did anything to mislead him. The auctioneer was not authorized to dispose of the whole or any portion of the structures on the adjacent premises; and the Defendant cannot justly complain that the Plaintiffs were not the owners of that which they did not assume to sell, and which was not included in his purchase.

As the title acquired by the Defendant extended only to the middle of the eastern and southern walls, it is obvious that the mutual easement for their support was a benefit and not a burden, to him as well as to the adjacent proprietors. It was a valuable appurtenant, which passed with the title of the property, and its value to him was not diminished by the fact that it was equally beneficial to the adjacent owners (Eno v. Del Vecchio, 4 Duer, 53). It is manifest that the Collins Hotel would be materially diminished in value, if these walls were to be so pared down as to deprive them of their present support. Their thickness does not appear; but it is fair to assume that the builder availed himself of the advantage of this mode of construction, by adding as much to the interior area of the structure as was consistent with its entire security. It is true that the erection of a party-wall creates a community of interest between neighboring proprietors; but there is no just sense in which the reciprocal easement for its preservation can be deemed a legal encumbrance upon the prop-

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erty. The benefit thus secured to each is not converted into a burden, by the mere fact that it is mutual and not exclusive (Partridge v. Gilbert, 15 New York, 601).

Even if this were otherwise, there would still be nothing in the present case to justify the Court in refusing a decree in favor of the Plaintiffs. There was no failure of any substantial inducement to the contract. The Defendant acquired what he proposed to buy; and he was so well satisfied with the purchase that, after full opportunity of examination, he approved the form of the proposed conveyance, and executed a bond and mortgage for the balance of the price. Even when he concluded not to fulfil his contract, he did not suggest the objection on which he now rests his defence. The Plaintiffs tendered substantial performance of their agreement; and, if the Defendant really deemed it desirable to fill up part of the interior of the building with an additional thickness of wall, standing wholly on his own ground, an appropriate allowance could have been made by way of compensation. But he made no such claim; and there is no finding, as matter of fact, that the value of the premises is in any degree diminished by the reciprocal easement of which he complains. In such a case, a denial of specific performance would be in contravention of the plainest rules of equity (Winne v. Reynolds, 6 Paige, 407; King v. Bardeau, 6 Johnson's Ch. R. 37; Ten Broeck v. Livingston, 1 id. 357).

The judgment should be affirmed.

GROVER, J.—But one question is made by the counsel for the Appellant. That is, that the title of the vendors to the property which the Appellant agreed to purchase was defective. The property was situated in the city of New York, and consisted of a lot upon the corner of Hoboken and West streets, forty-four feet by eighty, upon which there was a building, used for and known as the Collins Hotel.

The purchase was made at an auction sale. A clear title to the lot and building of the dimensions described was shown by the vendors, except that it appeared that two of the outer walls of

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the building were party-walls of this and buildings upon the adjoining premises; and that the party-walls were erected the one half in width upon the lot in question, and the other half upon the adjoining lots. This is the defect of title complained of. The rights of the proprietors of such walls have been settled by adjudication. Each owns in severalty his entire lot, with that portion of the wall located thereon, subject to the easement of the other owner to use the wall, for the support of his building (Partridge v. Gilbert, 15 N. Y. 601).

It follows that neither proprietor can remove the wall without the assent of the other, while it is in a suitable condition to support the buildings, and is required for that purpose.

It further follows, that the vendors could not convey an absolute, unqualified title to the half of the walls in question, which were situate upon the lot, for the reason that the adjoining proprietors had an easement therein for the support of their respective buildings.

To this extent the title was not absolute. But the vendors had a similar easement in the remaining half of the walls, situate upon the lands of the adjacent proprietors, for the support of their buildings, and this right would have passed to the Defendant by the conveyance offered. The Defendant's counsel insists that he ought not to be compelled to perform his contract, unless he will acquire thereby a complete title to the entire property he agreed to purchase.

As an original question, this might be the better rule, but the doctrine in equity has ever been held different.

That doctrine is, that if the vendor can give the purchaser the property contracted for, substantially, the purchaser will be compelled to take the title, although there may be an encumbrance upon the title, if such encumbrance can be compensated for consistently with the conclusion that the purchaser would have entered into the contract had he known of the encumbrance (2 Leading Cases in Equity, part 2, 20). Applying this doctrine to the present case, we find that the purchaser would obtain title to the property contracted for, subject to the easement of the adja-

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cent proprietors in two of the outer walls for the support of their buildings. That this easement is compensated for to the purchaser, by the acquisition of a similar easement in the walls of these proprietors, for the support of his building.

There was no suggestion upon the trial that this right was not a full compensation for the encumbrance.

It can scarcely admit of a doubt but that the Defendant would have made the purchase had he known that the two walls were party-walls, which in truth appear to be mutually beneficial to the proprietors. Under this state of facts, Defendant must complete his purchase.

The judgment appealed from must be affirmed.

All the Judges concurring,

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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THE PEOPLE OF THE STATE OF NEW YORK, EX REL. JUSTE LANCHANTIN AND OTHERS, PLAINTIFFS AND APPELLANTS, v. PIERRE A. LACOSTE AND OTHERS, DEFENDANTS AND RESPONDENTS.

Religious Corporations—Election of Officers—Quo warranto—Presumptions.

In an action in the nature of a quo warranto, those who hold the certificate of election to the office, and who are in possession of the office, are to be presumed rightfully and legally in possession. The presumptions are that the presiding officer did his duty in receiving the votes, counting them, and giving the certificate of election. To overcome this presumption, the Relator must show by proper evidence the contrary to be true, &c.

THIS is an appeal from an order of the Supreme Court, granting a new trial. The action is in the nature of a quo warranto, to try the relative rights of the Relators and the Defendants to the offices of warden and vestry-men of the French church Du St. Esprit, in the city of New York, and was tried before Mr. Justice E. Darwin Smith and a jury.

Under the direction of the Court a verdict was rendered for the Plaintiffs, and judgment was entered thereupon. The Defendants appealed to the General Term, where the judgment was reversed, and a new trial ordered. The Plaintiffs appealed to this Court from the order of the General Term, giving the usual stipulation.

The complaint alleges that, at an annual election of church-wardens and vestry-men of said church, held on Easter Monday, the 17th of April, 1865, pursuant to notice thereof given by the rector, and pursuant to the statute, the Relator, Lanchantin, was elected church-warden, and the other Relators were elected vestry-men of the said church.

The complaint further states, in substance, that Lacoste and the other Defendants, as church-warden and vestry-men respectively, had at the time of the commencement of the action, for more than a month, held and exercised, and still continued so to do, those

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offices, without any legal election, appointment, warrant, or authority whatever.

It further states that the Relators are rightfully entitled to hold and exercise said offices, and that the Defendants have usurped, intruded into, and unlawfully held and exercised, and still do unlawfully hold and exercise the same.

It still further states that said church is a religious Episcopal corporation, formed and organized under the laws of this State.

In their answer, the Defendants join issue on all the allegations of the complaint, except as to the fact of an election held pursuant to notice by the rector, and in accordance with the statutes, and the allegation that the said church is a religious Episcopal corporation, formed under the laws of this State.

They allege, in addition, that they have been lawfully elected to the respective offices held by them, and that they have since held and used said offices, as they have a lawful right to do.

On the trial the Defendants introduced no testimony after the Plaintiffs rested, and the Court directed a verdict for the Plaintiffs.

The facts of the case material to its decision, and not stated above, appear in the opinion.

Wheeler H. Peckham, of counsel for Plaintiffs and Appellants.
A. J. Parker, of counsel for the Defendants and Respondents.

FULLERTON, J.—Section first of article first of title sixth of chapter eighteenth of part first of the Revised Statutes provides for the election of wardens and vestry-men in the Protestant Episcopal Church in this State. The section contains this provision: "At all such elections" (referring with other elections to the annual election of wardens and vestry-men), "the rector . . . shall preside, and receive the votes of the electors, and be the returning officer, and shall enter the proceedings in the book of the minutes of the vestry, and sign his name thereto, and offer the same to as many electors as he shall think fit, to be by them also signed and certified."

It appears that at the election in question, one hundred and

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thirty-eight votes were cast. Of these, nineteen were for the Relators, and one hundred and nineteen were for the Defendants.

The rector presided at the election, received the votes, acted as the returning officer, entered the proceedings in the book of minutes of the vestry, signed his name thereto, and procured the same to be signed by twenty-seven other persons. In the entry made he certified that it appeared, from a canvass of the votes, that the Defendants Lacoste and Gueutal were elected wardens, and that the other Defendants were elected vestry-men. By virtue of this election the Defendants entered into the offices claimed by the Relators.

The Defendants having received their certificate of election from the rector, are primâ facie entitled to the offices in question.

It was the duty of the rector to preside at the election, and "to receive the votes of the electors, and be the returning officer."

The presumption is that he did his duty, and received only the votes of electors.

The Relators, in order to succeed in this action, must establish, by competent evidence, that at the election they, instead of the Defendants, were duly elected. The burden is upon them. They must prove, not only that illegal votes were cast for the Defendants, but also that, if the illegal votes were deducted, the Defendants had not received a majority.

In other words, it was incumbent on the Relators to show that the Defendants, who held the certificate of election, and who were in possession of the office, received less than a majority of the votes of the duly qualified electors voting at the election.

To constitute a legal elector, one must be a male of full age, who shall have belonged to the church or congregation for the last twelve months preceding the election, and must, in addition to these three requisites, have been baptized in the Episcopal Church, or have been received therein, either by the rite of confirmation or by receiving the holy communion, or by purchasing or hiring a pew or seat in said church, or by some joint act of himself and the rector, whereby he shall have attached himself to the Protestant Episcopal Church.

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The Plaintiffs, to overcome the presumption created against them by the certificate of the rector, examined eighteen witnesses. The examination of fifteen of them was confined to their own qualifications as electors. One of the remaining three was not examined as to the qualifications of any electors.

The two others were examined with reference to the qualifications of particular voters, not exceeding in all thirty, including those who voted for the Relators, and then were asked some general questions with reference to the remaining voters as a whole.

One of these witnesses was asked the following question:

"Q. Those other individuals who came up and voted, and did not vote 'your ticket'" (i. e., the Relator's), "had you seen any of them at that church for more than a year preceding that election?

"A. *Not that I recollect.*"

On his cross-examination he says:

"Q. Do you profess to be able to state from your recollection all you have seen attend there?

"A. *Not by any means.*"

He gives only his recollection at best.

This is all the testimony given by this witness with reference to the voters not specially named. The other witness swears as follows:

"Q. What persons did you see vote that printed ticket" (i. e., the Defendants'), "whom you knew personally, whether they were voters or not?

"A. There is only one, I *presume*, that voted that ticket that is a pew-holder."

The presumption of the witness is of no value; and if it were of value, it only relates to one of a class of equally important qualifications.

The same witness, after referring to several voters by name, says: "All the others, I do not know anything at all about them." This may mean very little, and possibly very much. The witness was then asked the following question:

"Q. You may say the residue of those persons were not voters?"

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Question objected to by counsel for the Defendants.

Objection overruled, and exception taken.

"A. Yes, sir."

No importance should be attached to this question and answer, in considering the evidence in the case.

The question was clearly improper. Whether they were or were not voters was a question for the jury, under the instructions of the Court, as to what were the qualifications of an elector.

It was argued by the Appellants' counsel, that inasmuch as the question was asked by the Court, no objection or exception could be taken to it.

We do not understand that the Court has any greater right to ask, against the objections of counsel, improper questions, than counsel have; and if, against objection, he asks improper questions, it is the duty of the Appellate Court to correct the error.

Again, the witness testifies:

"Q. Do you know that none of the others were pew-holders?

"A. There was none of the others."

Again:

"Q. I understand you as saying that none of the others than those that you have named upon the list which you hold in your hand were connected with the church in any way, as attendants, communicants, or pew-holders?

"A. I do not know of any more, to the best *of my knowledge.*"

The witness subsequently testified that they may have been connected with the church, and he might not have known it.

The testimony above referred to is all that is in the case with reference to the qualifications of about one hundred and thirty-eight voters.

We see no reason to reverse the judgment.

The new trial was properly granted, and under the Code (§ 11) we have no discretion but to direct judgment absolute for the Defendants.

Judgment absolute for Defendants.

JOEL TIFFANY,
State Reporter.

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SAMUEL A. SWINNERTON ET AL., RESPONDENTS, v. THE COLUMBIAN INSURANCE COMPANY, APPELLANTS.

Marine Insurance—Exceptions in Policy—State of Civil War—Historical Facts as Evidence.

To create belligerent rights it is unnecessary that there should be war between independent powers. They may exist between parties to a civil rebellion.

A civil war exists whenever the regular course of justice is interrupted by revolt, &c., so that the Courts cannot be held open.

On the 21st of April, 1861, a civil war existed in Norfolk, Virginia, and the taking of Plaintiff's vessel under the pretended authority of Virginia, and loading the same with stones, and sinking the same, to obstruct navigation, was one of the acts of such war, and caused the loss to fall within the exceptions of the policy of insurance.

Matters of public history affecting the whole people, Courts will take judicial notice of, and will resort to such documents as may be at hand and be worthy of confidence.

THIS is an action to recover upon a policy of insurance, executed by the Defendants in September, 1860, upon one-sixteenth part of the schooner "Lawrence Waterbury," for one year from its date; the policy containing in the margin a warranty, "free from loss or expense arising from capture, seizure, or detention, or the consequences of any attempt thereat." The body of the policy was in the usual form of a marine policy.

In February, 1861, while the vessel was on a voyage from St. Marks, Florida, to New York, and while the policy was still in force, she was disabled by a storm at sea, and forced to put into Hampton Roads, where she was stranded on the beach, and remained there until about the 30th of March, 1861, when the master and wrecker succeeded in getting her off, and taking her into Norfolk, Virginia, for repairs.

On the 21st of April, 1861, while the schooner was undergoing these repairs at Norfolk, thirty or forty men seized her, broke open her cabins, filled her with stones, took her down about a mile below Norfolk, toward Fortress Monroe, and sunk her in the channel of the river.

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The captain of the schooner (who was also part owner, and one of the Plaintiffs—Swinnerton), remonstrated with the men who were engaged in this proceeding, stated to them that he was master, and resisted their proceedings by ordering them to desist and leave, but without effect. The man who was giving orders to the others to throw the stones aboard, and who, Swinnerton testified, "appeared to be the boss, or head man," paid no attention to the protest and remonstrances of the captain, but merely remarked "that the State of Virginia was good for it;" and when asked by what authority he had possession of the schooner, replied "that it was by authority of the State of Virginia."

The captain also applied to a lawyer for legal assistance, and to a military man to whom several persons referred him, but could get none. He also applied to see if he could get the vessel up, but could get no satisfaction. He testified that "it was all confusion then in the place; it was a perfect mad-house." The persons engaged in this work cut through the schooner's deck, and put about one hundred tons of stone on board her.

A steamer lay alongside her all the time she was being filled, and when filled took her away to the place where she was sunk, as before stated. There was a great deal of cheering and hurrahing when she went off.

The captain testified further, that he had not violated any law or regulation of the port, and was not notified that he had, nor charged with having done so. The vessel was never recovered.

Due notice of abandonment of the vessel to the Defendants was served upon them in proper time by the Plaintiffs; and due proof of interest in the vessel, and of her loss, was in like manner made and delivered by the Plaintiffs to the Defendants, in New York, May 7, 1862; the captain of the vessel not being able to leave Norfolk until the 27th of April, 1861.

The Defendants' counsel moved for a dismissal of the complaint, on the ground that the testimony, in connection with the history of the times, showed that the seizure and detention of the vessel was by direction or permission of the authorities of the

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State of Virginia, or of the city of Norfolk, in which case, they allege, the loss would fall within the exceptions of the policy, or else it showed that the Plaintiffs did not make a proper resistance to the seizure, or a sufficient effort to procure the protection of the authorities.

The Court denied the motion, and the Defendants excepted.

The Defendants' counsel then offered to read the "Secession Ordinance" passed by the State of Virginia on the 17th of April, 1861. The Plaintiffs objected to the reading of the ordinance as matter of evidence, on the ground that it was immaterial and irrelevant.

The Court sustained the objection, but permitted it to be read, to fix its date. It was read accordingly. It purported to be a declaration and ordinance by "The People of Virginia," that the union between the State of Virginia and the other States, under the Constitution of the United States of America, was thereby dissolved, and that the State of Virginia was in the full possession of all the rights of sovereignty which belong and appertain to a free and independent State, and that the Constitution of the United States of America was no longer binding on any of the citizens of Virginia; and the same ordinance further declared, that it should take effect and be an act as of its date, when ratified by a majority of the votes of the people of Virginia, cast at a poll taken on the fourth Thursday of May, 1861, in pursuance of a schedule thereafter enacted.

The protest of the master of the vessel (Swinnerton), made in New York, on April 30, 1862, detailing the circumstances of the loss of the vessel, was read in evidence by the Defendants. The facts which it alleged or recited are substantially those above stated to have been established by the Plaintiffs' testimony. This was all the testimony introduced or offered. The Defendants' counsel then requested the Court to charge the jury that, if the seizure and detention were by the authorities of the State of Virginia, or the city of Norfolk, it was within the exception of the policy warranting the insurers free from loss or expense in case of seizure or detention, and the Plaintiffs were not entitled to recover.

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The Court refused to do so, decided that there was no question for the jury, and directed a verdict for the Plaintiffs to the amount of their claim as proved. The Defendants' counsel excepted, and the jury found a verdict for the Plaintiffs, as directed, for $1,065.62.

The General Term of the Superior Court of the City of New York affirmed the judgment entered upon this verdict.

From this judgment the Defendants have brought their appeal to this Court.

Thomas G. Shearman for Appellants.
John H. Reynolds for Respondents.

HUNT, J.—The body of the policy on which this action is brought contains the following clause: "Touching the adventures and perils, which the said Columbian Insurance Company is contented to bear and take upon itself, in this voyage, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, taking at seas, arrests, restraints and detainments of all kings, princes, or people of what nation, condition, or quality soever."

In the margin of the policy is the following statement: "Warranted free from loss or expense arising from capture, seizure, or detention, or the consequences of any attempt thereat."

It is clear upon authority that the recital last quoted constitutes a warranty on the part of the assured, and that it is a qualification of the obligation of the insurer, contained in the covenant before cited (Dole *v.* Merchants' In. Co., 51 Maine, 465; Dole *v.* New Eng. In. Co., 6 Allen, 373; Fifield *v.* In. Co., 47 Pa. R. 166; The Prize Cases, 2 Black's R. 635).

It is held in the same cases that the capture of an insured vessel by a cruiser of the so-called Confederate States is within this warranty, and relieves the insurer from liability upon the policy.

These decisions were based upon the principle that when a portion of the citizens of a civil government have rebelled, established another government, resorted to arms to maintain it, and the rebellion is of such magnitude that the military and naval

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forces of the government have been called out to suppress it, they are to be regarded as belligerents.

To create belligerent rights, it is not necessary that there should be war between separate and independent powers. They may exist between the parties to a civil war. A state of actual war may exist without a formal declaration of it by either party; and this is true both of a civil and a foreign war. A civil war exists whenever the regular course of justice is interrupted by revolt, rebellion or insurrection, so that the Courts cannot be kept open (2 Black, Prize Cases, 667, 668). It is further held, by the same authorities, that the capture of an insured vessel by an unorganized body of men, who are thieves, robbers, and pirates, simply, with no pretence of authority from an organized government, does not relieve the insurer from liability, under the clauses in question.

I shall examine the questions arising in this case, upon this theory of the rights of the parties.

On the 21st of April, 1861, the Plaintiffs' vessel was undergoing repairs in the port of Norfolk, Virginia, where she had been driven by stress of weather.

On the morning of that day, a body of men, thirty or forty in number, took her from the place where she was being repaired, and towed her to a wharf in another part of the city. Here, aided by an equal number of men on the wharf, they broke open the cabins of the vessel, filled her with stones, and took her about a mile down the river. She was towed off amid the cheers and shouts of those on shore, and sunk at the mouth of the channel. The person conducting these operations paid no attention to the remonstrances of the captain, but informed him that what he did was by authority of the State of Virginia.

The captain could obtain no aid from the military, and no relief from the Courts. It was a scene of public excitement—as the witness terms it, of madness—the occasion of which will appear hereafter.

Properly to appreciate the condition and rights of the parties, it is necessary to look at the state of the country on the 21st of April, 1861, when the events we have detailed occurred.

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The written constitution, under which the government of the "United States of America" was formed, was adopted in 1787.

At the close of the war with Great Britain, in which its independence was accomplished, the Union was composed of thirteen States. In 1861 the Union consisted of thirty-six States, possessing many rights independent of each other, and independent of the United Government formed by them. Of these States Virginia was one, South Carolina, Georgia, Mississippi, Alabama, Texas, and Florida, were others. The disputes and jealousies existing between the different sections of the country, and the people of the different States, took form and shape in the autumn of the year eighteen hundred and sixty. The elections held in November of that year resulted in the choice of Abraham Lincoln as President of the United States. A portion of the Southern States, professing to consider this result, and the principles of the successful party, as destructive of the institution of African slavery then existing in those States, determined to withdraw from the Union. The right thus to withdraw had been claimed by those States for many years, while the claim had been steadily and uniformly denied by the Northern States. On the twentieth of December, eighteen hundred and sixty, with ostentatious defiance, the State of South Carolina, by a convention called to act upon this particular subject, declared that the ordinance of seventeen hundred and eighty-eight, whereby the Constitution of the United States was ratified, and all acts of the State of South Carolina ratifying amendments of that constitution, were repealed, and declaring "that the union now subsisting between South Carolina and other States, under the name of 'The United States of America,' is hereby dissolved."

The raising of armies, and the appointment of commissioners to proceed to Washington to demand the delivery to that State of all forts, light-houses, and magazines within its limits, and also for the apportionment of the public debt and a division of all the public property of the United States, immediately followed.

During the months of January and February then next, the

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States of Mississippi, Alabama, Louisiana, Florida, and Texas adopted ordinances to the same effect.

In the month of February, eighteen hundred and sixty-one, the deputies from these States assembled at Montgomery, in the State of Alabama, and organized a government upon the same general plan as the one then and now constituting the Union of the States of America. They elected a president and vice-president, and organized a congress to consist of senators and members from the several States forming their nation. A cabinet of executive officers was selected, the moneys and credits of the government were issued; commissioners for foreign States were appointed; military, naval, and civil officers were designated; a national emblem was assumed, and all the forms of a permanent and an efficient government were adopted, with the name of "The Confederate States of America." The States of North Carolina, Virginia, Tennessee, Missouri, and Arkansas subsequently joined this confederacy.

It is sufficient, for the purpose of deciding the legal questions before us, to say that the rebellion thus organized assumed gigantic dimensions.

A war was carried on for four years by land and by sea between the two governments, with varied success on the part of the different armies.

It terminated in the triumph of the government and the complete overthrow of the rebellion, in the spring of eighteen hundred and sixty-five; but not until the government had expended three thousand millions of dollars in its suppression, and three hundred thousand Northern soldiers had laid down their lives in thus maintaining the integrity of their government.

These subsequent and important transactions, to which I have alluded so briefly, are competent to be considered in determining the status, in the month of April, 1861, of the parties whose acts we are to consider (Prize Cases, sup.).

When the State of South Carolina attempted its separation from the Union, its harbor contained several forts garrisoned by United States troops.

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Both the soil and jurisdiction of these forts belonged to the United States, and that government declined to yield them to the repeated and urgent demands of South Carolina. Major Robert Anderson, of the United States Army, was in command of these forts in this month of April, and had transferred his men and munitions from Fort Moultrie to Fort Sumter, both being forts within a short distance of the city of Charleston, and in its harbor.

General Beauregard, who had been appointed by the Confederate States a brigadier-general in their service, was in command of the troops in the city of Charleston.

The refusal to surrender Fort Sumter being persisted in, that officer, on the 12th day of April, by the special order of the Secretary of War of the Confederate States, opened fire upon the fort. The preparations for its reduction had long been in progress; seventy men only formed its garrison, and seven thousand men formed the attacking force.

An unarmed vessel, loaded with provisions for the relief of the garrison, had been fired upon by the Confederate authorities, and compelled to abandon her purpose. After a siege of twenty-four hours, its men exhausted, its supplies consumed, and its quarters on fire, the fort was surrendered.

Its commander, with his forces, marched out with the honors of war, saluting the flag of his country as it was lowered.

The news of this surrender was telegraphed to the authorities at Montgomery. In answer to the congratulations of the assembled multitude, L. Pope Walker, Secretary of War of the Confederate States, announced the intention of his government to pursue its success, and predicted that, before the first of May following, the Confederate flag would float in triumph from the Washington Capitol.

On the fifteenth day of April, President Lincoln issued a proclamation, reciting that the execution of the laws of the United States was obstructed in the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by law,

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and calling forth the militia of the several States to the number of seventy-five thousand.

Within ten days thereafter, the President of the Confederate States issued a proclamation that he would grant letters of marque against the commerce of the United States, and did issue many commissions of that character.

This call of President Lincoln was contemptuously refused by the Southern States, but earnestly and immediately responded to by the Northern States. The men needed were at once supplied.

The Sixth Regiment of Massachusetts Volunteers, while passing through the city of Baltimore, on the nineteenth of April, in response to the President's call, was attacked by a mob. The most of the soldiers were raw recruits, unarmed, and separated from their officers. Three of the soldiers were killed, many were severely injured, and many of the mob were killed and injured. The railroads leading to and from the city of Baltimore were torn up and blockaded; troops and supplies could only reach Washington by a circuitous route, and that city was for a time in a state of substantial blockade.

The excitement created by these transactions was scarcely inferior to that created by the attack upon Sumter. It pervaded all classes and all sections, receiving approval or condemnation according to the position of the parties affected.

Before referring to the condition of public affairs in Virginia at the time of the capture of the vessel in question, the following extract from the Southern historian of the war will illustrate the condition of the country at the close of Mr. Buchanan's administration: "When he ceased to be President, on the fourth of March, eighteen hundred and sixty-one, seven Southern States went out of the Union; they had erected a new government; they had secured every Federal fort within their limits, with two exceptions, Sumter and Pickens; they had gathered not only munitions of war, but had obtained great additions in moral power; and although they still deplored a war between the two sections as a 'policy detrimental to the civilized world,' they had openly and rapidly prepared for it.

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"Fort Moultrie and Castle Pinckney had been occupied by the South Carolina troops. Fort Pulaski, the defence of Savannah, had been taken; the arsenal at Mount Vernon, Alabama, with twenty thousand stand of arms, had been seized by the Alabama troops; Fort Morgan, in Mobile Bay, had been taken; Forts Jackson, St. Philip, and Pike, near New Orleans, had been captured by the Louisiana troops; the Pensacola Navy-yard, and Forts Barrancas and McRae, had been taken, and the siege of Fort Pickens commenced; the Baton Rouge Arsenal had been surrendered to the Louisiana troops; the New Orleans Mint and Custom-house had been taken; the Little Rock Arsenal had been seized by the Arkansas troops; and on the eighteenth of February Gen. Twiggs had transferred the military posts and public property in Texas to the State authorities" ("The Lost Cause"; by Edward A. Pollard, pp. 98, 99).

Virginia was ultimately a member of the Southern Confederacy, and, in the desolation of her territory by contending armies, illustrated the horrors of civil war.

At this time she was in active sympathy with the Confederates, and at once refused to comply with President Lincoln's call for men to sustain the country.

On the 17th of April the convention of the State of Virginia passed its ordinance of secession. That portion of it which required its submission to the popular vote was entirely disregarded. The State put itself in active and immediate co-operation with the Southern Confederacy.

On the same day another ordinance was passed, "to call volunteers into the service of the State" (Laws of Va. 1861, App. 8).

The Governor issued a proclamation under this ordinance, calling upon the militia to hold themselves in immediate readiness; and in reference to President Lincoln's call for men, he uses this language: "That Virginia, by a majority approaching to entire unanimity, declared, at its last session, that the State would consider such an exertion of force as a virtual declaration of war, to be resisted by all the force at the command of Virginia; and sub-

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sequently the State Convention, now in session, reaffirmed the same policy with almost equal unanimity."

In refusing to respond to this call, Gov. Letcher closes his communication in these words: "You have chosen to inaugurate civil war, and we will meet it in a spirit as determined as the administration has exhibited toward the South (An. Reg. 1861, "Virginia").

On the day of the passage of the ordinance of secession, the printed sign, "United States Court," in the Custom-house building, was taken down, and the Confederate flag was raised on the Capitol, in which the convention was sitting. The Custom-house was taken out of the hands of the United States officials, and placed under a guard of State troops. The steamships Yorktown and Jamestown (private property) were seized and put in charge of Virginia State troops (id.).

On the night of the 16th of April, says the historian Greeley (Am. Conflict, vol. 1, p. 471), "the channel of the Elizabeth River, near Norfolk, was obstructed by sinking two small vessels therein, with intent to preclude the passage, either way, of Federal ships of war. The number appears to have been increased during the following nights, while a hastily collected force under Gen. Taliaferro, a Virginia brigadier, who reached Norfolk from Richmond on the 18th, was reported to be preparing to seize the Navy-yard and Federal vessels during the night of Saturday, the 20th."

At this yard were the valuable steam-frigate Merrimac, the Cumberland, Germantown, Plymouth, Raritan, Columbia, Dolphin, Pennsylvania, Delaware, and Columbus, with nearly two thousand cannon, and immense quantities of arms, munitions of war, naval stores, and timber (id. 473).

On the 21st of April all these vessels were sunk or burned, and all this property destroyed, by the United States authority, under the direction of Capt. Paulding of the navy, to prevent its falling into the hands of the rebels. Cannon were spiked, the muskets and revolvers broken, shot and shell thrown into the water, the ships scuttled or fired, and the barracks set on fire. As soon as

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the United States troops had departed, a volunteer company took formal possession in the name of the State of Virginia, and raised her flag on the ruins (id. 476).

In describing the effect upon Virginia of President Lincoln's proclamation of April 15th, calling for seventy-five thousand men, Mr. Pollard says: "Two days after the interview of her commissioners with President Lincoln, her people were reading his call for a land force of seventy-five thousand men; and almost instantly thereafter the proud and thrilling news was flashed over the South, that Virginia had redeemed the pledges she had given against coercion, and was no longer a member of the Federal Union, but in a new, heart to heart, defiant union with the Confederate States of the South" (Lost Cause, p. 116).

The same authority says that, "on the 29th of April, President Davis (of the Confederate States) wrote to the Confederate Congress, then convoked by him: 'There are now in the field, at Charleston, Pensacola, Forts Morgan, Jackson, St. Philip, and Pulaski, nineteen thousand men, and sixteen thousand men are now en route for Virginia. It is proposed to organize and hold in readiness for instant action, in view of the present exigencies of the country, an army of one hundred thousand men'" (id. 117).

In another place he says: "Virginia had taken her decisive step, and passed her ordinance of secession, on the 17th day of April. It became an immediate concern to secure for the State all the arms, munitions, ships, war stores, and military posts within her borders which there was power to seize.

"Two points were of special importance—the Navy-yard, at Gosport (opposite to Norfolk), with its magnificent dry-dock, its huge ship-houses, shops, forges, warerooms, rope-walks, seasoned timber for ships, masts, cordage, boats, ammunition, small-arms, and cannon. Besides all these treasures, it had lying in its waters several vessels of war.

"The other point was Harper's Ferry, on the Potomac River, with its armory and arsenal, containing about ten thousand muskets and five thousand rifles, with machinery for the purpose of

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manufacturing arms, capable of turning out twenty-five thou sand muskets a year" (id. 122).

A large force of Virginia volunteers, to the number of 2,500, was immediately collected to attack Harper's Ferry. To prevent its falling into their hands the garrison set fire to the arms and buildings, and escaped across the railroad bridge into Maryland.

The historian above quoted says: "The retreating garrison had laid trains to blow up the workshops, but the courage and rapid movements of the Virginians extinguished them, and thus saved to their State the invaluable machinery for making muskets and rifles." This was on the 18th day of the same month of April.

It is impossible to shut our eyes so closely as not to see that a war had actually been commenced against the United States government before the 21st of April, 1861. The evidences I have cited are unanswerable. The formal passage of the ordinance of secession by Virginia, the immediate appointment of commissioners to the Confederate government, the sinking of vessels in the channel, the presence of armed troops, the destruction of the navy-yards, the assault on Harper's Ferry, the avowed declarations of the authorities of the State that she was to range herself with her Southern allies, the concentration of military forces at Norfolk, the declaration by the officer in charge that this vessel was seized by authority of the State of Virginia, her sinking to obstruct the passage of United States vessels to this port, the shouts and applause of the people, the excitement pervading all classes, the impossibility of finding aid in the Courts, afford the strongest reason to conclude that this seizure was an act of war, and not the act of a mob. The actors were not hostes humani generis, nor did they act causa lucri.

The act of April 21st, 1861, is to be received and passed upon as we now, in 1867, see and understand it. It doubtless had greater significance than many of its actors were aware of, and was a prelude to a contest anticipated by none (Prize Cases, sup. 2 Black).

No declaration of war is necessary to give to individuals, or to nations, the rights resulting from that condition of society. It

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is the actual condition that produces the result, and not the presence or absence of a declaration to that effect by either party.

In the contest between the United States and Mexico, in 1846, the battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress of May 13th, 1846, which recognized "a state of war as existing by the act of the Republic of Mexico."

This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the act of the President, in accepting the challenge without a previous formal declaration of war by Congress (Prize Cases, 2 Black, 668).

With the light reflected upon them by subsequent events, it would be absurd to say that the taking of Fort Pulaski, which was the sea-coast defence of Georgia; or the seizure of Forts Jackson and St. Philip, which defended the approach to New Orleans; or the attack upon Harper's Ferry, a depot and manufactory of fire-arms, were the acts of riotous individuals simply; or to say that the surrender of Gen. Twiggs, by which an empire in extent, an army in numbers, and a fortune in property, were transferred to the rebellion, was the illegal act of an individual simply; or to say that their acceptance by the State of Texas was a private and unauthorized transaction only. Each of these acts was in pursuance of a purpose well understood. They were intended, as they were calculated, to weaken the military power of the government, and strengthen that of the States named, to furnish the means of rebellion, and to destroy the power to suppress it. Whether the act of seizing and destroying the Plaintiffs' vessel was a part of the same scheme, was a question for the jury. I think proof of the ordinance of secession was competent, and that the general question of the object and character of the seizure should have been submitted to them. I have not overlooked the objection made by the Respondent to the consideration by this Court of the facts of history, to which I have referred.

It is objected that the case contains no evidence of the existence of a civil war; that it does not show that the mob was act-

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ing by any public authority, and that no historical proof was offered to the Court, by any authentic history, that the condition of things existed, as we are all aware they did exist, in fact.

This objection I do not consider a sound one. The rule I take to be this—that matters of public history, affecting the whole people, are judicially taken notice of by the Courts; that no evidence need be produced to establish them; that the Court, in ascertaining them, resorts to such documents or reference as may be at hand, and as may be worthy of confidence. Thus, in the Prize Cases already cited (2 Black's R. 667), the Court uses this language: "The actual existence of civil war is a fact in our domestic history which the Court is bound to notice and to know."

Knowledge of the main fact would necessarily carry with it knowledge of the particular acts of war which created that condition of things.

Upon a careful reading of these cases, as reported, as well as of the arguments of counsel on both sides, and of the opinion of the Court, and the dissenting opinion of Judge Nelson, I see no statement that proof was made of any of the general facts of the early history of the rebellion. Particular proclamations were read, correspondence with foreign authorities was referred to, the special facts of the capture of the vessels and their circumstances were proved, and the general facts connected with the history of the country seem to have been assumed as within the judicial cognizance of the Court. I have quoted the language of the Court on this point, and it was not denied by counsel against whom it applied, nor doubted in a dissenting opinion which holds that, until the passage of the act of Congress of July 13th, 1861 (but three days before the first battle of Bull Run), no war existed, in a legal sense, between the armed hosts of the different sections of the country; but that it was simply "a personal war against the rebels," on the part of the President. The general language of the Court is, therefore, entitled to full significance.

Mr. Greenleaf says, in his work on Evidence (at §§ 4, 5, 6): "All civilized nations being alike members of the great family of

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sovereignties, may well be supposed to recognize each other's existence, and general public and external relations. The usual and appropriate symbols of nationality and sovereignty are the national flag and seal. Every sovereign, therefore, recognizes, and of course the public tribunals and functionaries of every nation take notice of, the existence and titles of all the other sovereign powers in the civilized world, their respective flags, and their seals of State. In like manner the law of nations, and the general customs and usages of merchants, as well as the public statutes and general laws and customs of their own country, are recognized, without proof, by the Courts of all civilized nations; neither is it necessary to prove things which must have happened, according to the ordinary course of nature; nor to prove the course of time, or of the heavenly bodies; nor the ordinary public fasts and festivals; nor the coincidence of days of the week with days of the month; nor the meaning of words in the vernacular language; nor the legal weights and measures; nor any matters of public history affecting the whole people. Courts also take notice of the territorial extent of the jurisdiction and sovereignty exercised de facto by their own government; and of the local divisions of their country, as into states, provinces, counties, cities, towns, local parishes, or the like. They will also judicially recognize the political constitution or frame of their own government; its essential political agents or public officers sharing in its regular administration, and its essential and regular political operations, powers, and action. Thus notice is taken, by all tribunals, of the accession of the chief executive of the nation or State under whose authority they act; the genuineness of his signature; the heads of departments, and the principal officers of State; the election or resignation of a senator of the United States; the appointment of a cabinet or foreign minister.

"In fine, Courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction. In all these and the like cases, where the memory of the Judge is at fault, he resorts to such documents of reference as may be at hand, and he may deem worthy of confidence."

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In the Bank of Augusta v. Earle (13 Peters' R. 590), Ch.J. Taney says: "And it is a matter of history, which this Court is bound to notice, that corporations, created in this country, have been in the open practice, for many years past, of making contracts in England, of various kinds and to very large amounts, and we have never seen a doubt suggested there of the validity of these contracts."

In Jack v. Martin (12 Wend. 328), the Court expressed the opinion that it was warranted in taking official notice of the existence of slavery in Louisiana, as a part of the public history of the country. For other instances of what is officially noticed by the Courts, I refer to 3 Com. R. 188; 17 Wend. R. 88; 4 Seld. R. 182; 10 Barb. R. 406; 20 N. Y. R. 65; 6 Duer, 633; 3 Sand. Ch. 571; 6 Hill, 475; 7 Cow. 429; 7 Wend. 460; 16 N. Y. R. 125; 4 Kern. 623).

I entertain no doubt that the historical facts necessary to the decision of the case were proper for the judicial consideration of the Court, without the production or offer of proof.

I have cited the histories of Mr. Greeley and Mr. Pollard, not as authorities, nor because any authorities were needed, but as containing condensed and satisfactory statements of the particular facts which were useful for the purposes of this action, and for the reason that the two historians, differing toto cœlo in their views and feelings, give concurrent statements of the facts in question. I should not deem it necessary that any history should be cited, or any proof made, to show that Henry the Fifth conquered France, or that his son lost it; that Charles the First was beheaded; that Napoleon the First established an empire, and died in exile. These are facts of general history, the truth of which Courts would hold and juries would find, assuming their existence.

It is none the less a fact, in general history, that Mr. Lincoln was President of the United States, and that he was assassinated while holding that office.

It is none the less true and none the less historic, that a war between the different sections of the United States occurred as I

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have recited, and that its origin in Virginia was based upon the facts I have stated.

This rule is limited to no particular lapse of time, and to no particular class of facts, except that they shall be those of general history.

A new trial should be ordered.

DAVIES, Ch.J., and WRIGHT, J., for affirmance.

Reversed.

JOEL TIFFANY,
State Reporter.

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CALVIN M. NORTHRUP, Plaintiff in Error, v. THE PEOPLE, &c., Defendants in Error.

Statutory right—Assignment of Courts and Judges—Place of holding Court—Adjournment of Term.

The Court of Oyer and Terminer cannot lawfully be held at any place other than that determined upon by the Judges of the Supreme Court, communicated to the Secretary of State, and published in the State paper, in pursuance of the statute in such case made and provided.

A trial and conviction of a person of a felony at a Court held in the town of Bedford, when White Plains is the place legally designated for holding such Court, is without authority and erroneous.

The Plaintiff in error was indicted by a grand jury of the county of Westchester, in September, 1866, for administering poison to his wife.

In December following, a Court of Oyer and Terminer convened at the Court-house in White Plains, in said county, and it was ordered, and proclamation made, that the same be adjourned to the 14th day of January, 1867, at the Court-house in Bedford, in that county.

At the adjourned day, at Bedford, only ten petit jurors answered, and the Court directed that seventy-five talesmen be summoned by the sheriff for the following morning, till which time the Court adjourned.

These talesmen were accordingly summoned from the town of Bedford, and some of them sat upon the trial of the indictment.

Before the jury were called, certain objections were made by the counsel for the prisoner to the legality of the Court as thus sitting, and to the jury as thus constituted. The District Attorney having moved the indictment for trial, the Defendants' counsel showed that in the appointment by the Justices of the Second Judicial District of terms for the holding of Courts, no appointment for the holding of any Court of Oyer and Terminer to be held at Bedford, for the county of Westchester, had been made for either of the years 1866 or 1867, and it was therefore contended that the Court then and there sitting had no rightful power or authority

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to proceed with the trial. This objection was overruled, and exception taken. Another objection was, that only ten petit jurors of those summoned having appeared, "the Court then ordered the Clerk to prepare ballots of the jurors in said town of Bedford, and ordered the sheriff to proceed and draw seventy-five jurors from the box containing the names of said jurors in said town of Bedford to act as talesmen." This objection was placed on the ground that the order should have been to summon enough jurors from the county at large, or from the bystanders, to make the whole number at least twenty-four, from which to draw a jury. This objection was also overruled, and the decision duly excepted to.

John S. Bates, District-Attorney, and
Chauncey Shaffer for the People.
Robert Cochrane for Prisoner.

FULLERTON, J.—By the laws of 1813 (vol. 2, p. 142, § 4), White Plains and Bedford were fixed as the places where the Courts of Common Pleas should be held in the county of Westchester, and the Circuit Courts and Courts of Oyer and Terminer were required, by a subsequent statute, to be held at the same places.

Section 17 of the Code repeals the statute last referred to, and substitutes another mode of appointment. By section 22 the Judges of the Supreme Court of each district are required to appoint the times and places for holding Courts within their respective districts. Section 24 provided, however, that the *places* appointed within the several counties for holding said Courts, should be those designated by statute for holding County or Circuit Courts. By the same statute (§ 25), it is made necessary that these appointments thus made should be transmitted to the Secretary of State, and, when received by that officer, it became his duty to cause the same to be published in the State paper, at least once a week for three successive weeks before the holding of any Court in pursuance thereof.

Under this authority the Justices of the Supreme Court of the

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Second District, in November, 1865, at a meeting for that purpose, designated and appointed White Plains as the place for holding the Circuit Courts and Court of Oyer and Terminer for Westchester county, for the years 1866 and 1867, but omitted so to designate Bedford. It is not so stated in the case, but it is to be presumed that these appointments were duly transmitted to the Secretary of State, and published by him in pursuance of the foregoing statute.

In pursuance of this appointment, a Court of Oyer and Terminer convened at White Plains in December, 1866, and for some reason not disclosed in the case was adjourned to the 14th day of January then next following, at the Court-house in Bedford. At such adjourned term the Plaintiff in error was tried and convicted of administering poison to his wife, with intent to kill; and at a subsequent term was sentenced to the State prison for twelve years.

Before the trial the prisoner's counsel objected to proceeding therewith, on the ground that the adjournment from White Plains to Bedford was unauthorized, and this presents the only important question in this case.

The power to fix the times and places of holding Courts was committed by statute to *all* the Judges, and not to a *single* Judge of a judicial district. In virtue of this power, White Plain was the only place appointed for holding the Courts of Oyer and Terminer, for the year 1867, in the county of Westchester. It was not in the power of a single Judge, at any time, and certainly not after all the Judges had united in making the appointments, to appoint any other place for holding Courts in that county. By statute, whenever three or more persons or officers are authorized or required by law to perform any act, such act may be done, and such power, or authority, or duty may be exercised or performed by a majority of such persons or officers so intrusted or empowered (3 R. S., 5th ed. 869, § 29).

I cannot see why this provision does not apply to this case. It was designed to prevent the exercise of a power delegated to a number of persons by less than a majority of that number. This

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design is frustrated, if a single Judge is permitted to adjourn a Court to a place purposely omitted to be designated by all the Judges, when they assembled and made the appointments as required by law. The policy of the law is to inspire confidence in the administration of justice. It is the right of every citizen to know the times and places for holding the Courts where his liberty or property may be put in jeopardy, and that would be a lax system of legislation indeed which would leave them the subjects of sudden and perhaps capricious changes. Our Legislature has not so left them. They have solemnly determined that all the Judges of each district shall unite in designating the places of holding Courts, and require that the appointments thus made shall be published in the State paper for three weeks before any Court shall be held in pursuance of them.

To sanction the Court at which the prisoner was convicted is to annul entirely all these provisions. I have not failed to consider the argument that Bedford was one of the places which *might* have been designated for holding the Courts in Westchester county. But the answer to this proposition is, that it was not designated and published as the statute required, and for that reason was not a place for holding a Court.

The power of a Court to adjourn to another *place*, as well as *time*, is not necessarily involved in this case; but if even that should be conceded, it would still be necessary to adjourn to a place where it would have originally been proper to hold a Court. When the places for holding the Courts were incorporated in the statute itself, it would not have been pretended that a Judge could hold a Court at any other place, under any circumstances, without legislative authority. During the prevalence of "war, pestilence, or other public calamity, or the danger thereof," Courts may be held at places different from those appointed by statute (3 R. S., 5th ed., § 75, p. 480).

In such cases, however, the change is to be made "in writing, under the hand of the Governor," and recorded in the office of the Secretary of State, and published in as many public papers as the Governor shall designate (§ 76). This shows that the Legislature

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considered the appointment of the places where Courts should be held as a matter of importance, and that they did not intend they should be changed for slight causes, and not at all unless such change was duly published. (See also §§ 15 & 16 of the Code respecting adjournments of the Court of Appeals.)

I can see no difference between the force of an appointment directly by statute, and one made by Judges to whom the Legislature has delegated its power to make it, especially where, after it is made, it is required to be lodged in the archives of the State, and published in the State paper. Such an appointment ought to be as immutable as if made by the Legislature itself.

Even if the power of determining where the Courts should be held had been conferred upon a single Judge, the action of the Court, in this instance, could not be sustained. The adjournment of the Oyer and Terminer to Bedford was not, ipso facto, an appointment of that place for holding the Court, within the meaning of the statute. It still would be necessary to transmit the appointment to the State Department, and have the same published according to law. These provisions of the statute cannot all be regarded as merely directory.

In the case of the People *v.* Moneghan (1 Parker's Crim. R. 570), it was held that Courts of Sessions could not be held except in pursuance of a previous order of a county Judge, made under the authority of the laws of 1851 (ch. 444), designating the *times* when such Courts should be held, and published as therein directed.

The question arose as follows:

By the act referred to, it was provided that "Courts of Sessions, except in the city and county of New York, shall be held in the respective counties at such *times* as the County Judge of the county shall *by order designate* . . . such order shall be published in a newspaper printed in such county for four successive weeks previous to the time of holding the first term of said Court under such order."

The County Judge of Livingston county, under this authority, attempted to appoint the *times* for holding the Court of Sessions

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in that county, but erroneously made the order to apply only to the *County* Courts.

A Court of Sessions was held on one of the days thus appointed, at which a person was indicted and convicted of felony. The proceedings were removed into the Supreme Court, where the indictment was quashed, on the ground that no valid appointment for holding the Court had been made.

The places at which Courts are held derive an additional importance from the terms of the statute relating to trials by jury. Chapter 210 of the laws of 1861 provides, that in addition to the box, by law now provided and kept for drawing jurors, the clerk of every county shall provide another box, in which he shall deposit the names of all persons who have been selected and returned as suitable persons to serve as jurors, and who reside *in the city or town where Courts are appointed by law to be held;* and that whenever the regular panel is insufficient, the sheriff shall draw from the box so provided the names of as many persons as shall supply any deficiency. In this case the regular panel was exhausted, and the remaining jurors were drawn from the box provided for by the law just quoted, and consequently *were taken from the town of Bedford.* To this the prisoner's counsel objected. It follows, of course, that if the Court was improperly adjourned to Bedford, the prisoner was not properly tried before the jury there empanelled, and has therefore lost the benefit of a substantial statutory right.

The cases cited (8 Cowen, 286; 1 Seld. 22), to show the extent of the power of adjournment by bodies invested with it, are not applicable to this case, for many reasons. These are cases where the qualified electors of a town, at their annual town meeting, after having duly organized, adjourned to another place to consummate the business before them. This was held to be proper, in the exercise of a power conferred upon them by the statute, to hold their meetings at such places as they should from time to time appoint. Here is no limitation as to place; and though the electors met at a place appointed the year previous, yet having so met and duly organized, they were, ex vi termini, *clothed with*

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their original power of adjournment, and could then exercise it without rendering their proceedings invalid.

No one can doubt for a moment that the learned Judge who adjourned the Court to Bedford was prompted by the purest motives; but this cannot enter into the consideration of this Court in determining as to the legality of the act.

The judgment appealed from must therefore be reversed, and a new trial ordered.

Reversed.

JOEL TIFFANY,
State Reporter.

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THE OHIO AND MISSISSIPPI RAILROAD COMPANY, APPELLANTS v. WILLIAM M. KASSON, MARSH W. KASSON, AND JAMES G. DUDLEY, RESPONDENTS.

Sale and Delivery—Title in Vendor—Bonâ fide Purchaser—Fraud of Vendor.

A contract to build and deliver railroad cars to Plaintiffs at certain times and places, &c., does not vest the title to such cars in Plaintiffs until such cars are delivered and accepted.

A sale and delivery of such cars to a party purchasing in good faith, before delivery to Plaintiffs, transfer to the vendee a good title.

A subsequent payment for such cars by Plaintiffs, on the fraudulent representations of the maker of the cars as to the completion and delivery of the same according to the terms of the contract, will give them no title as against a bonâ fide purchaser.

THIS was an action to recover possession of four railroad passenger cars, Nos. 27, 28, 31, 32, from the Defendants, Kasson, Son & Co.

It was tried at the New York Circuit, and a verdict rendered for the Plaintiffs, and the value of the cars taken by the Plaintiffs from the Defendants' possession was assessed at $10,000.

The Defendants appealed to the General Term, and in April, 1862, the judgment was reversed, and a new trial ordered.

The Plaintiffs appealed from such judgment of reversal to this Court, and stipulated that if the order of said General Term should be affirmed, judgment absolute should be rendered against them.

The Plaintiffs were a railroad corporation of the State of Indiana, and having an office in the city of New York.

The Plaintiffs, on the 15th of November, 1856, made a contract with the Buffalo Car Company (of Black Rock, Erie Co., N. Y.), by Daniel J. Townsend, President, by which the Buffalo Car Company was to *build, sell, and deliver to* Plaintiffs, *within eighteen months from January first,* 444 box cars, 200 platform cars, 74 cattle cars, and fifty passenger cars, as follows:

To build them, *on the requisition of the Plaintiffs,* provided

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such requisition should not be for more than four passenger cars a month, &c., and, also, that *no deliveries be required under two months from notice of requisition.*

To deliver them *to Plaintiffs' order, at the company's works, after the cars should be inspected and approved by Plaintiffs.*

To pay the freight from the car company's works to the track of the Buffalo and Erie Railroad, in Buffalo.

The Plaintiffs agreed to buy the cars, and receive them from the car company, at the times and in the manner above described, and at specified prices.

To *provide an inspector*, on the car company's requisition—at least two weeks' notice to be given of the time when his services would be required.

To pay, *on presentation of his certificate of inspection at the Plaintiffs' office, in the city of New York*, from time to time, 45 per cent. in notes at six months, and 55 per cent. in Plaintiffs' bonds, at *eighty-five cents on the dollar.* Afterwards, and on 17th December, an arrangement was closed between the Plaintiffs and Defendants, by which Defendants were to transport certain rolling-stock from Buffalo to Cincinnati, for the Plaintiffs.

The cars which the Defendants transported for Plaintiffs, under this contract, were received by Defendants at their yard at Buffalo, only.

And the cars were deliverable to the Defendants *at their depot*, or on the Buffalo and Erie Railroad track.

About the 30th May, 1857, Townsend, the President of the car company, applied to Kasson to borrow $5,000. Kasson declined. After some negotiation a *sale* of two cars was proposed and accepted, and concluded, for $4,500.

They went to the works, at Black Rock—saw the two cars, Nos. 25 and 26, in an unfinished state, and the sale was agreed on. Townsend then gave Kasson a bill of sale of the two cars, and Kasson gave him two checks for $750 each, dated 1st June, and two notes for $1,500 each, which were paid.

Kasson went often to Black Rock to superintend the comple-

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tion of the cars, and about the middle of June took them and conveyed them to Defendants' yard, at Buffalo.

Townsend afterwards, wanting these two finished cars, proposed to substitute four unfinished cars in their stead. This was agreed to. Townsend and Kasson went to Black Rock and selected four unfinished cars, not lettered; and a bill of sale was made out for the four.

Kasson directed the four cars to be lettered the same as the cars of the Plaintiffs were. On the 13th or 14th of July, Kasson took away cars Nos. 27 and 28, and the other two, Nos. 31 and 32, about 25th July, to their own yard. The trucks, or running part of them, were put on wagons and carried directly by common road, from Black Rock to the Defendants' yard, in Buffalo, and the bodies of the cars, separate from the running gear, were hauled out of the car company's shops and put on trucks on the Central Railroad track, with a servant of Kasson's in charge, to go with them to Rochester, and thence to Kasson's yard, and *Kasson paid freight on them.*

These four cars continued in Defendants' possession from 13th and 25th July, to the January following, when they were replevied in this action.

On the 22d July Townsend presented to Mr. Gould, the Plaintiffs' treasurer, at New York, an invoice of the date of July 14th, for four passenger and seventeen cattle cars, and one box car, not numbered; and also a receipt of the Central R. R. Co., for passenger cars Nos. 27 and 28; and Gould paid Townsend for the cars so invoiced.

On the 29th July Gould paid Townsend for cars Nos. 31 and 32, *on being presented with the Central Railroad receipt*, and Townsend's invoice.

One Mellen had acted as inspector for a while, under the agreement between Plaintiffs and the car company. While so employed, his instructions were to inspect the cars, to receive them from the Central R. R. Company, see that they were delivered to the Defendants—being approved by him—and his certificate of inspection was sent on to Plaintiffs before payment for the cars.

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Mellen was discharged, and the Plaintiffs got into the habit of paying the car company for cars, on the production, merely, of the invoice and the Central Railroad receipts.

The car company failed in August of the same year.

J. Larocque for the Appellants.

Wm. M. Evarts for the Respondents.

HUNT, J.—In my view of the case, the Plaintiffs made payment to Townsend for the cars Nos. 27, 28, 31, and 32, in their own wrong.

The car company, of which Townsend was the President, contracted with the Plaintiffs to build for them and deliver to them a number of cars for their road, upon terms agreed upon. The cars were to be ready at intervals specified, were to be inspected by an agent of the Plaintiffs, upon notice given by the car company; the inspector was to make a certificate of inspection, and was to see that they were delivered on the track of the Buffalo and Erie R. R. Company, in the city of Buffalo, for the Plaintiffs.

Upon the presentation of this certificate to the Plaintiffs, and not sooner, the car company was entitled to demand payment for the cars. The Plaintiffs for a time held the car company to a strict performance of this contract, and furnished the inspector contemplated by its terms. In relation to the four cars in question, they relaxed their vigilance. They did not require an inspection as to their condition, nor a certificate from the inspector of their delivery, to or for them, on the Buffalo and Erie track.

They paid the purchase price upon presentation of an invoice from the car company, and a certificate from the New York Central Railroad Company, that the cars had been delivered to the Plaintiffs upon their road.

This certificate was carelessly given, and was erroneous. Before that time the cars had been purchased, and paid for, by the Defendants, and had been delivered by the car company to the Defendants, and by them transported to their yard in the city of Buffalo, and were then in their actual possession. No delivery was made to the Central Company for the Plaintiffs. The presenta-

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tion of the invoice and the certificate of delivery was fraudulent on the part of Townsend.

Upon this simple state of facts there can scarcely be a pretence of a claim against the Defendants for the price of these four cars. It stands thus: The Defendants had bought of the manufacturer certain railroad cars, which he had a right to sell, had paid for them, received them into and retained them in their actual possession. The manufacturer induces the Plaintiffs to pay him for the same cars, upon the fraudulent representation that he had delivered them to the agent of the Plaintiffs, under the contract for building similar cars. It needs no argument to show that the Plaintiffs must bear the loss.

The Appellants insist that a different result must be reached, for two reasons—first, that the Defendants stood in such confidential relations with the Plaintiffs, that they were not permitted to become the purchasers of these cars; and secondly, that it was the duty of the Defendants to have informed the Plaintiffs of their purchase of these cars; that their omission to do so justified the Plaintiffs in making payment to Townsend, and gives a just cause of action against the Defendants. As I understand the charge, the Judge at the Circuit ruled, that there were no such confidential relations existing between Plaintiffs and the Defendants, by reason of the contract mentioned, as would prevent the Defendants from becoming mortgagees or purchasers of the cars in question.

No point in favor of a new trial could, therefore, have been made at the General Term on this branch of the case, nor can the argument there be urged to sustain the judgment of the General Term. The proposition contended for by the Appellants is embodied in the refusal of the Judge to charge the following principle, upon the request of the Defendants, viz.: "That the delivery of the car bodies of 27 and 28, on July 10th, and of 31 and 32, on July 27th, to Kasson, in person, and the charge thenceforth by his man, till they came to and remained in the yard of Kasson, Son & Co., was a complete delivery to the Defendants as against all persons, and if the jury believe these car bodies were so deliv-

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ered, the title of the Defendants then became complete, and the Defendants are entitled to a verdict." The Judge charged in the following language: "That if the Defendants knew or had reason to believe that the consequence of their omitting to notify the Plaintiffs of their claim of title would be, that the Plaintiffs would pay the car company for the cars, on the proper evidence of their having been sent to them (the Defendants), and did so omit to give notice to the Plaintiffs, and the Plaintiffs did pay for the cars upon such evidence, without notice of any claim of title by the Defendants, that the Plaintiffs' title cannot be defeated by a title thus attempted to be acquired by the Defendants." If this charge had been accompanied by evidence of fraudulent collusion between the Defendants and Townsend, it would have been well enough. Under the proof as it stood, it was not competent to ask the jury to find upon the question of the bona fides of the bill of sale to the Defendants, and whether they knew, or had reason to believe, that an omission to give notice of their claim would induce the Plaintiffs to pay Townsend for four passenger cars that had never been delivered to them. The only facts in evidence pertinent to this point were, that they had purchased and paid for these four cars, and that the Defendants knew that a contract for building and delivering cars of various kinds, existed between Townsend and the Plaintiffs. If they knew this, they knew also that the Plaintiffs were not bound to pay for the cars until inspected, and a certificate given of delivery; and there is no evidence that they had the slightest reason to suspect that Townsend would present to the Plaintiffs full evidence of delivery, on which to obtain the money. There were not sufficient facts in evidence to justify the submission of these questions to the jury.

Neither am I prepared to acquiesce in the law thus laid down at the Circuit. Briefly, it is this: Townsend sells to Kasson four cars, having a right to sell them. They are delivered to Kasson, and paid for by him in good faith. Subsequently Kasson has reason to believe that Townsend intends to present fraudulent evidence of the delivery of the same cars to the Plaintiffs, and obtain their price from them. Unless Kasson thereupon notifies the Plaintiffs

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of his ownership, his title to the cars fails, and the Plaintiffs can reclaim them from his possession.

I am not aware of any principle of law on which this position can be defended. If there was collusion between Townsend and Kasson I can readily perceive why Kasson should respond to the Plaintiffs. So if Kasson did any act to promote or induce the payment by the Plaintiffs for the cars.

So if he had been present at the payment, and, without warning, had seen the Plaintiffs purchase and pay for the cars, he would have been held to have waived his claim in behalf of the purchaser. By the rule under consideration, he merely "had reason to believe" that Townsend would, at a future time, perpetrate a fraud—that Townsend contemplated the commission of a fraud.

If I know that a villain intends to defraud, or in any way to injure my neighbor, it is doubtless my duty as a good citizen, and as a Christian man, to put him on his guard. But there is no rule of law which renders me liable for his loss, in case of my neglect of this duty. It is a moral duty, simply, not recognized by law. Certainly there is no law which requires, upon mere suspicion or belief, that I should thrust myself into the business affairs of my neighbors, and endeavor to transact for them those concerns, and provide for them that wisdom and prudence which they are competent to furnish for themselves. It would be officious intermeddling, simply. The question of negligence on the part of the Defendants did not exist in the case, and was improperly submitted to the jury.

The Plaintiffs further insist that the Defendants must fail on the ground of usury in the transactions between themselves and the car company. The question of usury is a personal one, and cannot be raised by the Plaintiffs in this case. See Belmont Bank of Ohio *v.* Hoge (not reported), and Williams *v.* Burch, decided March term, 1867, where the precise question is disposed of.

Under the stipulation, judgment must be entered for the Defendants. It must, however, be limited to $3,000 and interest, together with the expenses of freight, insurance and storage, with interest upon them.

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On the trial the Defendants remitted all claim beyond these sums, and such remission remains of record in the case. The Defendants are at liberty to apply for a writ of inquiry to ascertain their damages, or a reference, or such other proceeding as they may be advised is legal and proper.

All concur, except DAVIES, Ch.J., and FULLERTON and BOCKES, JJ., not voting.

JOEL TIFFANY,
State Reporter.

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SIMEON FITCH ET AL., APPELLANTS, v. ZACHARIAH DEDERICK, RESPONDENT.

Evidence—Presumption—Knowledge of Contract—Liability of Third Party.

Mere knowledge by the Defendant, that a party had agreed with the Plaintiff to procure his, Defendant's, notes in payment for property purchased by such party, imposes no liability upon the Defendant.

APPEAL from the Supreme Court, Third District. The action was brought to recover the price of stone which the Plaintiffs, in their complaint, alleged that they had sold to the Defendant. The answer denied such purchase by Defendant. Upon the trial it appeared that one Patrick O'Donnell had two several contracts for the grading and paving of certain streets in Brooklyn; that in the execution of such contracts it became necessary for him to procure a quantity of stone; that the Defendant had had dealings with him, loaning him his notes and money, for which he had taken various securities, among which were orders for money becoming due for work done upon the said contracts; that O'Donnell applied to the Defendant for aid in procuring the stone for a portion of the work. Evidence was given tending to show that the Defendant authorized O'Donnell to purchase twenty-five hundred dollars' worth of stone on his credit, which was controverted by evidence introduced by Defendant. It appeared that O'Donnell agreed with Plaintiffs to give him the Defendant's notes in payment for the stone delivered to him. The Plaintiffs proved that the Defendant had loaned O'Donnell some twelve thousand dollars in money, for which the latter was indebted to the former, at the time the stone was delivered. This proof was properly excepted to by the Defendant. The Judge charged the jury that if the Defendant knew that his notes were promised to Fitch, and that the sale was made on the faith of receiving those notes, that would make the sale on that credit, and he would be

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responsible. To this portion of the charge the Defendant's counsel excepted. The Judge further charged the jury that, if the Defendant had any fund, or the control of a fund, which was to pay for those stone, and he knew the seller was to rely on that fund, he is responsible. To this portion of the charge the Defendant's counsel excepted. The jury found a verdict for the Plaintiffs, upon which judgment was rendered, which was reversed, upon appeal, by the General Term, and a new trial ordered; from which judgment the Plaintiffs appeal to this Court.

J. H. Reynolds for Appellants.

M. Hand for Respondent.

GROVER J.—The evidence excepted to by the Defendant was inadmissible. It had no legitimate bearing upon any issue in the case. The issue was whether the Defendant, by any agreement or act of his, had become liable to the Plaintiffs for the price of the stone in question.

The fact that he had, before the delivery of the stone, loaned O'Donnell money, for which he was indebted to him at that time, had no tendency to show any agreement to pay for the stone, nor any liability therefor, upon any of the grounds claimed by the Plaintiffs. The learned Judge erred in charging the jury that, if O'Donnell agreed to pay for the stone in the notes of the Defendant, and the sale was made on the faith of receiving such notes, that would make the Defendant liable therefor. The charge assumes that the Plaintiffs sold the stone to O'Donnell, and that the latter agreed to pay the Plaintiffs therefor in the notes of the Defendant; and instructs the jury that if the Defendant knew that such an agreement was made, and the stone delivered by the Plaintiffs, upon the expectation of receiving such notes, the Defendant was liable therefor. This might all be true, and yet the Defendant may never have agreed with O'Donnell, or the Plaintiffs, to give his notes for any such purpose. Mere knowledge by the Defendant that O'Donnell had agreed with the Plaintiffs to give his notes in payment for property purchased by O'Donnell, imposed no liability upon the Defendant.

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It is not necessary to examine the other portion of the charge excepted to. The order appealed from must be affirmed, and judgment rendered against the Plaintiff.

All concur.

Judgment absolute for Defendant.

JOEL TIFFANY,
State Reporter.

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NICHOLAS E. PAINE, RESPONDENT, v. THOMAS BROWN, APPELLANT.

Condition precedent—Tender, not necessary when it is an idle ceremony—Contract—Construction.

The law does not impose upon a party the duty of performing an idle ceremony. When it appears in evidence from the party claiming that a tender should have been made to him, that he would not have accepted it if made, to insist that a tender should have been made by the other party is to insist upon an idle ceremony, which the law will not require.

T. R. Strong for Appellant.
Geo. C. Munger for Respondent.

DAVIES, CH. J.—The Plaintiff, as assignee of one Calvin T. Chamberlain, brings this action to recover the sum of $2,000, being the amount of the first payment to be made upon a contract for the sale by Chamberlain, and the purchase by the Defendant, of one-fifth of the Indiana Central Canal.

The contract was in these words: "Memorandum of an agreement. C. T. Chamberlain agrees to sell, and convey by deed of release, to Thomas Brown, one-fifth part of the Central Canal in Indiana, north of Morgan county, for the sum of ten thousand dollars; and the said Brown agrees to purchase the same, and pay that sum therefor; two thousand dollars are to be paid in July next, and the balance in one and two years, with interest from the first of May next.

"This contract is to be put in form in course of this month, at Rochester, N. Y. If Joseph Robinson does not take a fifth of said canal, in pursuance of his verbal agreement, said Brown is to have one quarter of said canal at same rate, to wit: for $12,500, and payments as above.

"C. T. CHAMBERLAIN. [L. S.]
"THOMAS BROWN. [L. S.]

"Indianapolis, March 12, 1859."

The first payment called for by said contract not having been

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made, this action was brought in November, 1859, to recover the same, with interest thereon from May 1, 1859.

The jury found a verdict for Plaintiff, and the exceptions taken were directed to be heard, in the first instance, at the General Term, which gave judgment for the Plaintiff; and the Defendant now appeals to this Court.

When the Plaintiff rested his case the Defendant moved for a non-suit upon these grounds:

1. The contract in suit appears upon its face to be incomplete, and does not purport to be a contract of purchase and sale between the parties, but an agreement for a contract.

2. The Plaintiff has not shown any performance, or offer to perform, within the time limited by the agreement, or at any other time.

3. The deed tendered or offered in July is not in accordance with the contract. It varies from the contract in the description of the property, and in the estate which it purports to convey.

The Court charged the jury, amongst other things, that the contract of the 12th of March, 1859, was complete in itself, and that it was not necessary for the Plaintiff to tender, or offer to enter into, any further contract, or tender any conveyance within the time specified in the contract for putting the same in form at Rochester, N. Y., and that it was sufficient if he tendered a conveyance in the month of July following, when he required payment of the $2,000, to be paid in that month. To this part of the charge the Defendant's counsel excepted.

The Judge also charged the jury that, inasmuch as the Defendant did not, when the deed was offered to him in July, insist upon a more complete contract, he must be deemed to have waived it; and it must be considered that he was satisfied with the contract as it was.

To this part of the charge the Defendant's counsel excepted.

The Judge also charged the jury that the tender in July, as proved in the case, was a sufficient tender; and to this part of the charge the Defendant also excepted.

In the view we take of this contract, no obligation was im-

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posed upon the Plaintiff, or his assignor, to tender any conveyance as a condition precedent to his right to demand the sum of $2,000, to be paid, by its terms, in July, 1859. And it was, in this aspect of the case, wholly immaterial whether the tender of a conveyance made in July, 1859, was or was not sufficient.

If no tender of any conveyance was called for by this contract before the sum of $2,000 therein mentioned was demandable and payable, it follows that no question of the sufficiency of the tender made could legitimately arise.

We think the Judge did not err in telling the Jury that it was not necessary for the Plaintiff, before he could properly demand the payment of the said sum of $2,000, to tender, or offer to enter into, any further contract with the Defendant, in respect to the subject-matter of the contract.

The Plaintiff by his act affirmed the contract and its sufficiency to compel him to sell and convey the subject-matter therein mentioned.

By the terms of the contract, it, that is, "this contract," was to be put in form in the course of the month of March, 1859.

It did not appear that either party desired the contract to be put into any other or a different form, either within the time specified therein, or at any other time.

Neither did the Defendant assume any such ground, when called upon in July, 1859, to fulfil said contract on his part.

On the contrary, he utterly denied any obligation resting on him, arising from said contract.

He told the Plaintiff that he did not want any deed, nor anything to do with the property.

"I told him I did not want any deed, nor anything to do with the property. I said they had not lived up to their contract, and I considered the whole matter a swindle."

These acts and declarations of the Defendant conclusively demonstrate that it would have been an idle ceremony on the part of the Plaintiff, either to have tendered a conveyance to the Defendant, or to have tendered, or offered to enter into, any further contract.

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It is very manifest that the Defendant did not desire a more complete contract, and that, so far as its terms and provisions, and form, were concerned, he was perfectly satisfied with it.

Even if such a tender was requisite, these acts and declarations of the Defendant show that any such tender would not have been accepted, and the law does not impose upon a party the duty of performing an idle ceremony (Slingerland *v.* Morse, 8 John. 370; Dyckman *v.* Mayor of N. Y., 7 Barb. 498).

But as already observed, no tender of any conveyance was required by the terms of this contract as a condition precedent, to demand the sum of $2,000 which, by its express terms, was payable absolutely in the month of July, 1859.

Where, by the terms of a contract, it was provided that all payments should be made previously to the execution of a deed (and this contract in substance provides the same thing), it was held by the Supreme Court, that it was not necessary for the Plaintiff to convey, or offer to convey, before bringing suit, even for the last instalment (Adams *v.* Wadhams, 40 Barb. 225).

By the terms of this contract, Chamberlain, the assignor of the Plaintiff, bound himself to sell and convey, by deed of release, the property described, to the Defendant, for the sum of ten thousand dollars; and the Defendant agreed to purchase the same, and pay that price therefor.

No time was fixed by the contract for the conveyance of the property, but the Defendant was to pay two thousand dollars of the purchase money in the month of July, 1859, and the remainder in one and two years, with interest from May 1st, 1859.

This case is not unlike that of Pordage *v.* Cole (1 Saund. Rep. 319), and is clearly within the doctrine there settled. That was an action of debt on specialty for £774 15s. The agreement was in these words:

"11 May, 1668. It is agreed between Doctor John Pordage and Basset Cole, Esquire, that the said Basset Cole shall give unto the said Doctor £775 for all his lands, with Ashmole House, thereunto belonging, with the brewing-vessels as they are now remaining in the said house, and with the malt-mill and wheelbarrow.

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In witness whereof we do put our hands and seals: mutually given as earnest in performance of this 5s.; the money to be paid before midsummer, 1668; all other moveables, with the corn upon the ground, excepted."

There was a demurrer, and it was contended on the part of the Defendant, that if by one single deed two things are to be performed, namely, one by the Plaintiff, and the other by the Defendant, if there be no mutual remedy, the Plaintiff ought to aver performance on his part, and, in this case, it was a condition precedent which ought to be performed before the action brought.

"But it was adjudged by the Court that the action was well brought, without an averment of the conveyance of the land, because it shall be intended that both parties have sealed the specialty. And if the Plaintiff has not conveyed the land to the Defendant, he has also an action of covenant against the Plaintiff upon the agreement contained in the deed, which amounts to a covenant on the part of the Plaintiff to convey the land; and so each party has a mutual remedy against the other."

Sergeant Williams, in his learned note to this case, says: "It is to be observed that covenants are to be construed to be either dependent or independent of each other, according to the intention and meaning of the parties, and the good sense of the case;" and that "in order to discover that intention, and learn with some degree of certainty when performance is necessary to be averred in the declaration, and when not, it may not be improper to lay down a few rules:

"1. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, *before* the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the *performance* a condition precedent; and so it is where *no time* is fixed for the performance of that which is the consideration of the money or other act." And he adds: "This seems to be the ground of the judgment in this case (Pordage v.

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Cole), the money being appointed to be paid on a fixed day, which might happen before the lands were or could be conveyed.

"But, 2. When a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance.

"3. Where a covenant goes only to a part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the Defendant, without averring performance in the declaration.

"5. Where two acts are to be done *at the same time*, as where A covenants to convey an estate to B, on such a day, and in consideration thereof B covenants to pay A a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform his part, though it is not certain which of them is obliged to do the first act."

To the same effect see Campbell *v.* Jones (6 Term Rep. 570).

The principles here enunciated have received the approval of the Courts of this State in the following cases: (Robb *v.* Montgomery, 20 Johns. 15; Tompkins *v.* Elliot, 5 Wend. 496; Harrington *v.* Higgins, 17 Wend. 376; Evans *v.* Harris, 19 Barb. 416; Grant *v.* Johnson, 1 Seld. 247).

In Robb *v.* Montgomery (supra), the Supreme Court said: "Where the payments are to precede the conveyance, it is no excuse for non-payment that there is not a present existing capacity to convey a good title, unless the one whose duty it is to pay, offers to do so, on receiving a good title, and then it must be made to him, or the contract will be rescinded. Here the Defendant never offered to pay, and never demanded a conveyance; and, therefore, it furnishes no bar to the suit, that, at a certain period, the Plaintiff had not the title."

In Grant *v.* Johnson (supra), the question was whether the Plaintiff could sustain an action for the second installment of the purchase money secured by the agreement, without averring and

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proving the delivery, or an offer to deliver a deed of the premises.

The Court said: "The parties have declared that certain payments were to be made, and certain acts performed by them respectively, at the times specified in the agreement. They must be held to have intended the performance of these acts, when, and of course in the order of time indicated in their covenants."

So in the case at bar, the covenants to pay the purchase money in the installment mentioned were all independent of, and intended by the parties to precede the actual conveyance of the property described.

The covenant to pay the two thousand dollars in July, 1859, was independent of and to precede any act to be done or performed by the assignor of the Plaintiff.

Upon the Defendant's breach, an action accrued to the assignor of the Plaintiff, and no sufficient defence was interposed.

These views conclusively show that the exception to the charge of the Judge to the jury, was properly overruled, and that the Plaintiff was entitled to judgment upon the verdict.

The judgment appealed from should be affirmed. All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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EDMUND W. HOWELL, APPELLANT, v. WILLIAM HUYCK, IMPLEADED, &c., RESPONDENT.

Parol evidence—Notice to produce Written Instrument—Pleadings.

APPEAL from the Supreme Court, Eighth District. The action was brought to foreclose a mortgage executed by one Charles B. Howell, a brother of the Plaintiff, upon land which was afterwards purchased by the Defendant. This mortgage was made to one Grunnendike, who assigned it, with all his other property, to L. N. Bangs, Charles B. Howell (the mortgagor), and Isaac H. Jameson, in trust for the benefit of creditors. In December, 1856, Charles B. Howell paid the amount due on the mortgage to L. N. Bangs, one of his co-trustees; and some time afterwards Bangs delivered the mortgage to him.

While the mortgage was thus in his possession, Charles B. Howell sold the land to a Mrs. Mills, who conveyed it to the Defendant, in 1858, by a deed making no mention of this mortgage. The mortgage was never cancelled of record. After the conveyance to the Defendant, the Plaintiff brought an action against the assignees of Grunnendike, to compel an assignment of this mortgage to himself; and such assignment was executed, under the judgment of the Court, in 1859.

Testimony was given by the Plaintiff to show that he advanced to Charles B. Howell the money with which the mortgage was paid, under an agreement that it should be assigned to him. Bangs, the trustee, who received the money, denied that this agreement was made known to him until long afterwards.

On the trial the Defendant asked the Plaintiff to produce the mortgage, which the Plaintiff declined to do, because notice to produce it had not been given. The referee held that the form of the pleadings was sufficient notice, and allowed the Defendant to give oral evidence of endorsements of payments on the mortgage. To this ruling the Plaintiff excepted.

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The Defendant offered evidence of the declarations of Charles B. Howell, while the mortgage was in his hands, and after it had been paid to the assignee, to show that it had been fully paid. The referee allowed the testimony, under exceptions, for the purpose of qualifying Howell's possession, but not as evidence of payment.

The pleadings are material only with reference to these rulings. The complaint alleged that the mortgage was "assigned and transferred to the Plaintiff," and "that he was the lawful owner and holder thereof." These allegations were specifically denied by the answer, which also alleged payment to Grunnendike's assignees. There is nothing else in the pleadings bearing upon these points.

The Defendant recovered judgment in his favor, which was affirmed at the General Term, and he now appeals to this Court.

George G. Munger for Appellant.

A. Ballard for Respondent.

FULLERTON, J. (dissenting).—According to elementary writers, there are three cases only in which notice to produce a paper required on the trial of an action, in the possession of the opposite party, is not necessary.

Mr. Greenleaf, in his treatise, thus states them:

1. Where the instrument to be produced, and that to be proved, are duplicate originals.

2. Where the instrument to be proved is itself a *notice;* and—

3. Where, *from the nature of the action*, the Defendant had notice that the Plaintiff intends to *charge him with possession of the instrument.*

In Cowen & Hill's Notes (note 843), the same thing is stated somewhat differently: "In general, where the possession of a paper by the Defendant is one of the grievances *charged in the Plaintiff's declaration*, it is not necessary to give any other notice to produce than the action itself implies." The rule thus stated is simple, and easy of application. It plainly applies to those cases, and those only, where one party, *in his pleadings*, charges the other, directly, with the possession of the instrument

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which is the subject of the action, or where the nature of the action is such that it amounts to a notice that he intends, on the trial, to charge him with such possession.

This rule has been frequently applied. The Plaintiff was permitted, without notice, to prove the contents of bonds, in a case where, in his declaration, he charged the Defendant with converting them (McClean *v.* Hertzog, 6 Sergeant & Rawle, 154; and see 1 Camp. N. P. 143; 3 B. & P. 143).

An execution was proved in like manner, in an action against a constable, for neglecting to return it (Wilson *v.* Gale, 4 Wend. 623). In a case, also, where the Plaintiff charged the Defendant, in the complaint, with entering his office and carrying away a bill of lading, the contents of the instrument were proved by parol, without notice to produce (Gilmore *v.* Wale, Anth. N. P. 87).

In an action on a note, the Defendant gave notice, with the plea, that he would prove the note usurious, and that the extra interest was contained in a small note which was given to the Plaintiff at the same time with the one declared on, and he was permitted to prove the contents of the latter note (Hammond *v.* Hopping, 13 Wend. 505).

In the foregoing instances, and many others that might be quoted, the instrument which was the subject of parol proof, was charged in the pleading to be *in the possession of the adverse party, or it was plainly manifest from the pleadings that it would be required on the trial of the action;* and it will be seen that such an allegation is a vital element in a case, in order to apply the rule. Hardin *v.* Kretsinger (17 Johns. 294), was an action of covenant for the non-payment of $150 in obligations. The defence was that the obligations had been delivered, and the covenant satisfied. The pleadings are not in the case. The Plaintiff's counsel objected to giving evidence of the receipt of the notes by the Plaintiff, without notice to produce them, and the objection was overruled. On appeal, the Court said: "The case does not state the nature of the pleadings, and we ought to intend that the Defendant *either pleaded*, or *gave notice that he would give in evidence, that he had delivered to the Plaintiff*,

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pursuant to the covenant, obligations amounting to $150, which were then and there accepted. . . . If so, then the principle of the case of The People *v.* Holbrook applies (13 Johns. 92). After reviewing all the cases, we held that in an action of trover for bonds or notes, no notice to produce the thing sought was necessary; and that where the form of the action gives the party notice to be prepared to produce the instrument, if necessary to falsify the testimony of the other party, it is not necessary to produce the instrument. The *form of the pleading, we must presume, gave the Plaintiff notice that he had received and had in his possession, obligations* to the amount of more than $150; he was bound, then, if he would falsify the allegation, to have come prepared to produce them."

The same rule has obtained in criminal cases. In indictments for stealing written instruments, the prosecutor need not give notice to produce them, but is permitted to give parol evidence of their contents (The People *v.* Holbrook, 13 Johns. 90; Commonwealth *v.* Messinger, 1 Binn. 273; Alexander *v.* Coulter, 2 Serg. & Rawle, 494; Moore *v.* Commonwealth, 2 Leigh, 701).

On the other hand, where an action was brought against an officer for money collected on an execution, *and the declaration was general for money had and received*, the Court held that the Defendant was entitled to notice to produce the execution (Gorham *v.* Gale, 7 Cow. 739).

And where the Plaintiff declared for a breach of an agreement, in not keeping fair and regular books, and it appeared on the trial that Defendant kept a large number of books, all except one of which were produced, it was held that parol evidence of the contents of the absent book could not be admitted without notice—*the declaration not being sufficient to apprise the party that it was wanted.*

In this case the Plaintiff in his complaint alleges that the bond and mortgage had been "duly assigned and *transferred*" to him, and that he was, at the time of the commencement of the action, "the owner and holder thereof."

These allegations are all *distinctly* denied. The answer also sets up that the Defendant had paid the bond and mortgage to the

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assignees of the mortgagee, who thereupon executed a proper discharge of the mortgage, aud delivered the same to the mortgagor, and surrendered the bond to be cancelled, and that it was thereupon cancelled and destroyed. Here the Defendant, instead of alleging that the mortgage was in the possession of the Plaintiff—which it was necessary for him to do, in order to avail himself of the benefit of the rule above stated—denies the fact from which possession might be inferred, and claims in his answer that it had been discharged.

If, instead of this, he had answered that the mortgage, though discharged, was in the possession of the Plaintiff, and that the payments which had satisfied it were endorsed thereon, then a case would have been presented where parol testimony would have been allowed, without a notice to produce the instrument. As it stood, the answer did not give the Plaintiff to understand that the production of the mortgage would in any way aid him in making out his defence. It was in no way intimated that any payments, or any receipt for the money paid, had been endorsed upon it. On the other hand, he was informed by the answer that the mortgage was paid and discharged. This does not by any fair interpretation imply that receipts were given for the money paid, much less that the payments appeared on the mortgage; or that it was discharged by anything that an inspection of the instrument would disclose. Again, it is well known that a mortgage is usually satisfied or discharged by an instrument separate and apart from the mortgage itself—the debtor taking no receipt whatever for the money paid.

The Plaintiff knew that he could make out his case without the production of the mortgage, and having had no intimation from the adverse party that he relied for his defence upon its production—on the contrary, having been informed by the answer that his ownership was denied—he was not bound, even admitting that he had it in his possession, to produce it on the trial. The referee therefore erred in admitting the testimony objected to.

But it is said that the papers which are the subject of this action, were presumed not only to be in the possession of the Plain-

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tiff, but also to be present in Court, and therefore no notice was necessary. The presumption that papers are present in Court is never indulged in, except in the class of cases I have already considered, where the complaint or answer had charged that they were in the possession *of the adverse party*, and it appeared that they would be required on the trial. Such a presumption could scarcely be indulged in favor of the Defendant, in this case, when we consider that the Plaintiff had actually proved, before the parol testimony was offered in support of Defendant's answer denying that the Plaintiff was the "holder" of the mortgage, that the mortgage, when paid in 1856, was handed to Charles B. Howell, the mortgagor, and was afterwards, in October, 1857, again seen in his possession.

The remaining question in the case arose on an offer to prove the declarations of Charles B. Howell, in October, 1857, when the mortgage was in his possession, *that it was paid.* This was objected to, and the referee held that the testimony was not competent upon the direct issue, but that he would receive it only *for the purpose of qualifying Howell's possession* of the mortgage. To this an exception was taken. I confess I am unable to see the distinction taken by the referee. Of what importance could it be in trying the issue of payment, to learn the character of Charles B. Howell's possession of the mortgage, except as it tended to prove that issue? There was no other issue in the case, and evidence qualifying the character of Howell's possession was either irrelevant or tended to prove payment of the mortgage. If merely irrelevant, the judgment would not be disturbed in a case of this character. But the testimony was pertinent to the issue.

The learned Judge who delivered the opinion in the Court below, says: "His possession of the mortgage was consistent with either of the two relations to it; the one, that he was holding it as trustee for Grunnendike's creditors under the assignment; the other, as mortgagor after payment and satisfaction. Under such circumstances, for the purpose of qualifying his possession, the declaration accompanying the exhibition of the papers was part of the res gestæ, and, it seems to me, might well be given to

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rebut the presumption that he held the papers as assignee, in trust."

The learned Justice, in using this language, overlooked the important fact that the amount of the mortgage had been fully paid by Charles B. Howell himself, *the year prior to the conversation* sought to be proved. After such payment there could have been no pretence that the *mortgage* was held *in trust for creditors*, nor was there any such suggestion on the trial. The testimony, therefore, was not proper, to meet the presumption suggested, because no such presumption could arise. Then, according to the argument, the testimony was proper, to show that Howell held the mortgage after *payment and satisfaction, as a cancelled instrument.* What is this but proving payment, which is the vital question involved in the case?

The learned Judge in the Court below admits that the declarations were not competent for the purpose of proving payments.

It appears plain, however, that they were received for that purpose *indirectly*, when it is conceded that it was for the purpose of showing that Howell held the "bond and mortgage, as mortgagor, after payment and satisfaction," because no conceivable use could be made of that fact, except to infer payment.

The purpose, therefore, for which the referee received the evidence was improper.

The judgment should be reversed, and a new trial granted.

Opinion for affirmance was read by WRIGHT, J., but has not been filed in the office.

For affirmance, WRIGHT, DAVIES, BOCKES, PARKER, GROVER, and HUNT, JJ.

For reversal, FULLERTON, J.

PORTER, J., takes no part.

No head-note can be prepared for this case, as the views of the Court have not been put on file.

JOEL TIFFANY,
State Reporter.

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AUSTIN DUNHAM AND GEORGE BEACH, JR., RESPONDENTS, v. STEPHEN C. WILLIAMS AND GEORGE H. PARKER, APPELLANTS.

Ejectment—Title to closed road—Adjacent owners—Colonial laws.

The rule of civil law which prevailed in all the colonial provinces of the Dutch was, that no one could claim a present or reversionary title in the soil of a public highway, on the grouud that he was the grantee of all lands through which it was laid out.

Plaintiffs owning premises on the west side of the road formerly leading from Jamaica and Flatbush to Brooklyn cannot maintain ejectment for the recovery of the abandoned road-bed, because under the rule of law above stated the legal title to said bed does not accompany the transfer of title of the premises adjoining said road on the west side thereof.

APPEAL from the Supreme Court. This was an action of ejectment for the recovery of a portion of the bed of an abandoned road which formerly led from Jamaica and Flatbush to the Brooklyn Ferry.

The cause was tried at the Kings Circuit, and a verdict was directed for the Plaintiffs. The material facts were undisputed, and they are sufficiently stated in the opinion. The judgment on the verdict having been affirmed, the Defendants appealed to this Court.

John E. Parsons for Appellants.
John H. Reynolds for Respondents.

PORTER, J.—The Plaintiffs owned the premises on the west side of the road, and they claimed half the road-bed on the ground that, in the grants through which they deduced title, their lands were bounded on the highway.

It is a familiar rule of law that, in such a case, the adjacent proprietor is primâ facie owner of the soil, subject to the easement in favor of the public. It is founded on the rational presumption that the ground was originally taken from the adjoining owners, and for the sole purpose of being used as a thoroughfare (Stiles v. Curtis, 4 Day, 333, 336; Woolrych on Ways, 5).

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assumption that the title of the Dutch government in the town highways passed to the British crown, we find them granted by Governor Dongan, in his subsequent letters patent, to the freeholders representing the corporation of Brooklyn. In 1721 this particular road was protected from threatened encroachment by a colonial law, which declared that it should be and remain the common road or King's highway forever, after the same manner and regulations as it has been heretofore (1 Van Schaick, 125). In 1809 a law was passed authorizing the conversion of the highway into a turnpike road; and it appears by the inquisition of the appraisers appointed to assess the damages of the owners, that the adjacent proprietors made no claim, but the damages were assessed in favor of the corporate authorities of Brooklyn and Flatbush, as the claimants of the fee in the road-bed.

Twenty-six years before the commencement of this suit, the turnpike company, under the authority of an act of the Legislature, and on the assumption that it had acquired title to the road, transferred it to the Brooklyn and Jamaica Railroad Company. That corporation, under like legislative authority, sold it to other parties, through whom the Defendants claim by intermediate conveyances. Though the use of the road for highway purposes had been discontinued five years before this action was brought, the Plaintiffs seem to have made no claim to it until a year or more after the property was purchased, inclosed, and built upon by the Defendant Williams.

We think the presumption in favor of the Respondents, from the fact that these lands adjoined and were bounded on the road, is clearly repelled by the evidence, and that their claim of title must therefore fail. This conclusion on the vital point in the case renders it unnecessary to consider the question whether an absolute fee was acquired by the turnpike company through the assessment proceedings under the highway acts. As it is clear that the Plaintiffs cannot recover, we are not called on to express an opinion as to the validity of the Defendants' title.

The judgment should be reversed, and a new trial should be ordered.

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All the Judges concurring, except HUNT, J., and DAVIES, Ch. J., who expressed no opinion,

Judgment reversed, and a new trial ordered.

JOEL TIFFANY,
State Reporter.

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ASAHEL H. HAVILAND v. JOHN P. HAYES.

Insanity—Findings of jury—Province of Court.

On the question of insanity, the judgment of a jury, when guided by the ability and discretion of an enlightened Judge, should not be lightly reversed.

When a decent, quiet, orderly man, meeting with losses of supposed importance to his position in society, abandons his business, secretes himself from observation, complains of his head, becomes noisy, obscene, and profane, shouts, sings, and prays, and finally becomes confessedly insane and dies a lunatic, the verdict of a jury, finding him insane from an early period after such losses occur, should not be disturbed for doubtful reasons.

THIS is an action to set aside a deed executed by Park Haviland and his wife to Albert Haviland, dated June 14, 1848, and also a confirmatory deed executed by Park Haviland to the Defendant on the 13th day of December, 1851. The ground of the action is the alleged insanity of Park Haviland at the time of executing the deeds referred to.

Albert Haviland died in April, 1855; and while the owner of the property conveyed, had executed a mortgage upon the same, under which a sale was had, and the Defendant became the purchaser in December, 1851. Park Haviland died in June, 1856, and the Plaintiff, as one of his heirs-at-law, commenced the present action. Issues were framed, by which various questions on the subject of the insanity of Park Haviland were presented. The issues were tried in June, 1860, and the jury answered the several questions in writing, and found that Park Haviland was insane and legally incapable of executing the deeds in question. At a Special Term held in the September following, the Judge who presided at the trial of the issues found and decided, as questions of fact, that the deeds were executed at the time alleged; that Park Haviland was insane at and prior to the execution of each of the deeds; adjudging that they be cancelled, and that the Plaintiff was entitled to recover one-fourth of the property described in the deeds.

A motion was made before the same Judge, by the Defendant,

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for a new trial, which was denied, and judgment entered against him.

The Defendant appealed from this judgment to the General Term of the Second District, where the judgment was reversed upon the facts, as certified in the order of reversal, and a new trial ordered. The Plaintiff now appeals to this Court, stipulating that if said judgment is affirmed, judgment absolute may be ordered against him.

H. A. Nelson for the Appellant.

A. J. Parker for the Respondent.

HUNT, J.—In border cases it may be difficult to say what is sanity and what is insanity.

A distinguished writer says: "No one can say when twilight ends or begins, but there is ample distinction between day and night."

Between sanity and insanity there is ample distinction. It is not necessary to attempt a definition of insanity, nor to criticise that made by Lord Brougham, or Sir John Nicholl, or Doctor Ray, or to distinguish between the definitions given by numerous other eminent writers. The present is not a case of twilight, but one having ample distinction as to its character.

A course of action for a series of years, entirely different from that governing mankind at large, and different from his own former conduct and character—where the principles, feelings, emotions, and grounds of action differ entirely from that we all recognize as governing ourselves; where the individual, without motive, abandons the better and brighter parts of his nature, neglects civilization and refinement and comfort; where this difference is permanent and marked; where the change in his intellectual capacity, from that of an educated, careful, and attentive business man, is to one who is allowed no money except a trifle, like that which will please a child—whose property and person are entirely under the control of others, brutally exercised, and uncomplainingly submitted to; who requires the daily care of his wife to shave him; who at length becomes an inmate of a lunatic asylum, confessedly

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insane, and who thenceforward lives and dies a lunatic—all these circumstances indicate a clear case of insanity.

Nice distinctions are here not required.

Prior to certain pecuniary losses, which occurred before 1827, it is proved that Park Haviland was a good business man, prudent, discreet, cheerful—a quiet member of the Society of Friends in his vicinity—ordinarily liberal, and in no way distinguished in his conduct from the most of his neighbors.

Numerous witnesses were examined who testified that for many years prior to 1848, and commencing as early as 1827, they had heard him shouting, praying, and cursing, so that he could be heard at a distance of a mile; they testified to his hiding himself from observation for many years; to his sitting in the hogpen for hours, when occupied by the hogs; to his sullenness and stupidity at his house; that he complained of pain in his head, and that all the business was transacted by his wife and his son.

If these were isolated transactions, not parts of his permanent character, I should not place much reliance upon them, as I do not upon the isolated instances of self-control or good conduct to which I shall hereafter refer. They seem, however, to have been his general characteristics for many years. His old acquaintances who had known him for forty years, his friends in the church, his relatives, all concur in this general estimate of his character and in their description of his conduct, and in the change in his character which then took place. The persons best qualified to speak upon this subject were those who had that opportunity of constant observation which a residence in the same family would give, who could see him at the table, in the family circle, and who knew his habits during a period of years in all the relations of life. It is to the wife, the children, and the domestics of the family that we should naturally look for the fullest information; and, in fact, their testimony is quite satisfactory to me, confirmed as it is by so many other witnesses in the case.

The wife testifies that she was married to Park Haviland in 1827; that after her son Albert was eighteen years of age, she and Albert managed the farm until 1850; that prior to this it was

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managed by his other sons, George and Asahel; that her husband did no business, except to do an errand, as a child, when requested; he took no interest in the business, and did no work. As early as the birth of her son Albert, in 1827 or 1828, and on that occasion, without any family difficulty, he went away and was absent for three or four days. He was absent again from September until March, leaving his wife and her infant child at home, with a son by a former wife, and without cause or occasion.

In describing his condition at a later period, this witness says: "From 1845 to 1849 my son exercised control over his father; he would take hold of him and tell him to do so and so; he would shake him at times, and tell him to hush up; he would have raving times, and chase people with an axe; he used indecent language to people travelling on the road; when struck or taken hold of he would obey—the same before giving the deed and the same afterward."

It was only her consent, as it appears from her testimony, that was necessary to the execution of the deed, and when that was obtained, and at her request and Albert's, the father, without inquiry or remonstrance, executed the deed. It was the wife, and not the father, who required the agreement for support to be previously made; and when made to her satisfaction, the affair was completed. On his return under her charge from the execution of this deed, he got out of the wagon, and upon the idea of fixing the harness, so unbuckled it that, on starting, the horse walked out of his harness and away from the wagon. The wife then got out, rearranged the harness, and drove him home, he sitting quietly in the wagon. She says that after the birth of Albert her husband had no money, except that sometimes the boys would give him a few shillings to please him. Sometimes he would hollo and scream night and day, and at all times; at other times he would be quiet. "I tried to keep these things from the world." Such would be the promptings both of delicacy and affection. In 1847 Park's eldest daughter came home and remained until the fall of 1848. Mrs. Haviland says that her husband was cross to her and thought she was not his daughter, but some of the

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Toffey folks. She shaved him during all this period, because she was afraid to trust him with a razor. He was once found away from home, in an out-building, with a rope. On her cross-examination she states she lived in the house with him before her marriage; that he was then noisy at times, but after his loss of property the disease grew upon him; he would swear and be noisy, without provocation; that there was but little conversation, except her efforts to keep him calm.

The hired man, Warren Wooden, was called by the Defendant, and testified to some transactions of business by Park Haviland, between April, 1850, and June, 1851, the period of his residence in the family. On his cross-examination, after stating certain matters hardly fit to be discussed, he says that "when excited he was very profane; the sight of Craft would excite him; he said he was going to have him in State prison. He never saw Craft pass without getting in a rage (this animosity was without cause); he chased a black man with an axe. She (Mary Jane Cronk) threw a pail of water on him one day, and then struck him with the pail. Mary Jane and he had a fight one day. Each had a weapon.

"He was swearing at the table, and Albert threw a vinegar cruet at him. I saw Albert take him by the collar and throw him down, and order him in the house. I thought from the noise Albert was whipping him. He holloed, 'Oh! oh dear,' a great many times. A man came there by the name of Halley. Albert ordered Park into the house. He went in, and after a while came out, and said the prisoner had got loose. Albert had tied him up. Albert went in with him again, and came out without him. Park was the largest—a large, strong man; he ordered him to shut up; said, 'Shut up your d—d old head;' he did not obey; Albert tried to slap him, and he could not, and left without his breakfast. I saw Albert jerk him on the floor; he got up and went to George's, as he said, and George said it was good enough for him. . . . I have heard him at night, after he had gone to bed, talk about the black man; he kept me awake; he said the black man had stolen a crow-bar."

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Mary J. Rider testified that she lived in the family of Park Haviland from 1842 to 1848. She says: "I did observe the acts and conduct of Park Haviland, while I resided there; he acted very boisterously; cursed and swore and holloed night and day; he would go into the fields and sit for hours at a time; he would wring his hands a great deal; he chased me several times with an axe; he would frequently wish thunder and lightning would strike the family; he would talk obscene language, let who would be present. These acts took place almost all the while, particularly the last year of my staying there. There were a great many of his acts which I cannot describe."

In answer to another inquiry, she said that "Albert was very cross and ugly to his father for a year or more before I came away. Would often strike his father—sometimes two or three times a day, when he got angry at him. I have seen Albert jerk him around and kick him. This was quite frequent during the last year I lived there. Albert could make him mind whenever he wanted to. . . . Albert used to threaten to whip his father if he did not give him a deed. . . . When they were in the house together, Albert was continually coaxing and threatening him for a deed; saw Albert get angry with his father, because he did not want to give him a deed, several times, and then he would strike him and jerk him around the room, and sometimes down on the floor. This conduct was frequent in the spring of 1848, and continued as long as I lived there."

We have no evidence that can be relied upon as to his physical health when the change in his character first occurred, except his complaints of pain in his head.

If it had appeared that at the same time his bodily health was seriously affected, that he lost his strength, that his vital energy failed, I think there would have been the strongest reason for believing that a disease of the brain was the seat of the difficulty. It would be no objection to this theory that he should subsequently have become large and fleshy, as this bodily condition is of common occurrence among those whose brain is seriously diseased.

The case was fully and fairly tried. The charge to the jury

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was not only correct, but it was wise and discriminating. They pronounced it to be a case of insanity.

I place great reliance upon the verdict of a jury thus guided and directed; more than upon the opinion of the Judges at a General Term, however learned they may be.

To show his mental capacity, it was proved by a stage-driver that the deceased grantor, about the date of the deed, was in the habit of sending notes by him for discount at the bank, and receiving the proceeds in return. Stage-drivers embrace all degrees of character, from the careful and worthy proprietor to the worthless vagabond.

It was for the jury to designate the position of this individual. The proof is most abundant that at this time, as well as for years before and after, he was the mere instrument of his son, submitting to his orders and obeying his wishes; that all the business of the farm and family were done by his wife and son, with the exercise of no judgment or authority on his part. I do not feel at liberty to disregard the opinion of the jury on this branch of the case.

It was proved also that the deceased grantor applied to a Justice of the peace to draw the deed to his son, and to Mr. Aiken to draw a bond for the support of himself and wife, and that his conversation was reasonable, and his conduct free from exception on those occasions.

It was proved also that he executed the quit-claim deed to Mr. Hayes, in the presence of a number of witnesses, and acted as a man of ordinary intelligence would have done.

This was testimony eminently for the consideration of the jury. They may have credited the statements partly, or they may have taken them with qualifications.

I can easily conceive how the jury may have believed them, substantially, and yet have reached the conclusion they did reach.

In the first place, the actor was well prepared for the occasion, and impressed with the necessity of careful deportment.

He was well dressed and carefully shaved by that faithful wife who had performed that duty for him during a period of twenty-seven weary years. He was probably well prepared by his son,

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as well by instruction as by persuasion, or by that rougher treatment of which the case contains so much painful evidence. The wife describes the preparation for the transaction, and the almost automatic manner in which Park performed his share in it. She says that Albert asked her when she and his father were going to execute the deed. She said not until he executed the bond. The same day the bond was executed and given to her, and she then consented to execute the deed.

She proceeds: "I said to Park, we will go down to Wesley Stark's and have the deed executed. He made no reply. I fixed him, shaved him myself—as I had done for twenty years—got him ready, and said, 'Park, we will go.'

"I put the deed in my pocket. Albert said to me, 'Take some money and pay Stark for executing the deed.' Park did not resist or make any reply. He got into the wagon. I drove three miles to Stark's. Nothing was said on the road about the business. When I drove up to Stark's I said: 'Here is a gentleman who desires to do a little business with you.' He asked who it was. I said, 'Park Haviland.' He said, 'What does he want done?' I handed him the deed. He said, 'Do you do this with your own free will?' Park did not appear to take any notice of it. I looked up to him and nodded my head, and Stark went on writing. . . . Stark said, 'You may come now and put your name to it.' I handed him my glasses, and he went and put his name down. I also signed it. He had no glasses of his own; he always used mine. The deed was not read to him, or by him, in my presence. When Stark said the deed was done, I took it and put it in my pocket and gave it to my son. No one was present when I gave it to him. I don't know that Park knew of the giving of the deed to Albert."

That Mr. Hayes had arranged the scene in which he was a party is reasonably apparent from his assembling so many persons to witness the transaction, and his previous request to one of them to put certain questions to Haviland, which the witness failing to do, Mr. Hayes himself put the questions, and received the desired answers.

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In the next place, it is well to consider here that the insane man is not in the same condition at all times. A man may be certainly insane, although he be not a raving maniac or an absolute imbecile. Nor is it necessary that a delusion which possesses him should at all times operate with the same force; or that his self-control should at all times be entirely lost. The benevolent institutions to which this class of unfortunates are now committed endeavor to stimulate their self-control by rewards or deprivations. The permission to work in the fields or the garden, to go to the post-office, to sell their productions, to drive with the better class of patients, to discharge any duty, or to fulfil any trust or confidence, are held out as rewards for good conduct and self-control.

These motives produce the most striking results, and show that the power of controlling their conduct and conversation is much more within the possession of the patients than is generally supposed. Nevertheless, such parties are undoubtedly insane. If a person has so little or such perverted intellect that he is unable to comprehend the subject before him in its relation to himself, the party with whom he is dealing, and others who have claims upon his justice or his bounty, his contract ought not to be sustained. He may be able to restrain his violence for the moment, and to converse with discretion and judgment for a brief period; there may be remissions or mitigations of his disease, and yet he be insane.

The two physicians, who had been long connected with lunatic asylums, gave it as their judgment that such was the case with Park Haviland.

On the question of "compos mentis" simply, and irrespective of the measure or extent of capacity, I concur with the jury that he was not "compos mentis," and that the deed was obtained by undue influence.

I have great confidence in the good-sense and judgment of a jury as applied to such cases; and when guided by the ability and discretion of an enlightened Judge, I think their verdict should not be lightly reversed.

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A decent, quiet, sober, orderly man meets with losses, important, as he supposes, to his position in life. From this time he abandons his business, soon secretes himself from observation, complains of his head; at length becomes noisy, obscene, and profane; shouts, sings, and prays so that he can be heard at the distance of half-a-mile.

From month to month, and year to year, he becomes more and more changed in his character; becomes subject to fits. He was found sitting for hours in the hogpen among the swine; he refuses to be consulted about anything; his wife and his son transact all his business; he has no money, except a few shillings given to please him; he does nothing except a few errands, as a boy; his son horsewhips him, ties him with cords, and throws him upon the ground, to which the father, the larger and stronger than the son, submits uncomplainingly; he has no spectacles of his own; he is shaved by his wife for a period of twenty-seven years; he attempts to commit suicide; he quarrels with the servant-girls on the most trifling pretences; follows them with an axe; he gives a deed of his farm at the simple direction of his wife, without remonstrance or inquiry; and in three years thereafter is placed in a lunatic asylum as confessedly insane, and dies an undoubted lunatic. I concur entirely in the finding of the jury that Haviland was insane at the time of the execution of the deed to his son, and at the time of the execution of the deed to Mr. Hayes. The judgment of the General Term must be reversed, and that of the Special Term affirmed.

Concurring: PORTER, GROVER, DAVIES, and BOCKES, JJ.

FULLERTON, J. (dissenting).—The objection that the questions of fact involved in this case were not open to review in this Court was not well taken. Notwithstanding that issues were framed and tried by a jury, yet for all the purposes of a review it is to be regarded as a trial by the Court, and as falling within § 268 of the Code. The judgment in such a case is not entered upon the answers of the jury to the questions put to them, but upon the findings of the Court, and the judgment is directed by the Court.

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Whether, therefore, upon the whole case, the judgment ordered was correct, is open for consideration here.

The burden of proof in this case was with the party seeking to invalidate the deeds. It lay with him to show, beyond any reasonable doubt, that Park Haviland was insane, or so far deranged in mind as to be incapable of transacting business, when the deed dated June 14, 1858, was executed, or, if of sound mind, that the deed was procured by force, fraud, or undue influence. In this, I think, he has failed.

It is undeniable that the grantor, at times, for some years prior to the date of the deed mentioned, exhibited many striking symptoms of insanity. But this was not his condition at all times. Some of the witnesses speak of the change in his mental condition taking place as early as 1816, when he met with some pecuniary losses.

On the trial of the cause, his conduct and condition, from that early period to the time of his death, were the subject of examination, and the following facts were established: His bodily health was for most of the time good, although at a very early period he complained of his head, and continued to do so at times during the remainder of his life.

He avoided the society of his fellow-men, and was in the habit of hiding himself in unusual and unseemly places. He remained silent when spoken to, and turned abruptly away from those who addressed him. He attached undue importance to losses, and indulged in vague and unwarrantable fears of bankruptcy, and consequent want.

He talked, when alone, in a loud and boisterous manner, and mingled with his prayers impious imprecations. He was extravagant and incoherent in his language, violent in gesticulation, and moved to great excitement by inadequate causes.

He was negligent in his dress, and, on some occasions, obscene in his language.

When excited, his face became unnaturally flushed, the veins of his temples much enlarged, and his eyes assumed an unnatural wildness.

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In enumerating what are claimed to be evidences of his insanity, we fail to find any disposition to *undervalue*, *waste*, or to *destroy* his property. Down to the date of the first deed, he seems to have made no improvident bargains, and to have taken ordinary care of what he possessed.

During this period he worked more or less on the farm. He mowed, cradled, stacked hay, and did the most, if not all, of the churning for the dairy. He made notes for large amounts, some of which he procured to be discounted, received and counted the proceeds, and sent them West to his son Albert to purchase cattle for the farm.

In his son's absence, he delivered some sheep that had been sold, and selected from a flock the particular ones the purchaser was entitled to under his contract. He consulted his physician as to his bodily diseases, stated the symptoms correctly and with precision, inquired intelligently as to the effect which was claimed for the remedies prescribed, and afterward informed the Doctor that he had experienced relief. This was in 1851, about three years subsequent to the execution of the first deed; and the family physician, in his testimony, says of him at that time: "I discovered nothing irrational—not the slightest aberration of mind. I think he was a sane man."

He applied to one of his neighbors to draw the deed conveying the farm to Albert; said he was going to give his son a deed of his farm, and wanted a bond back for the maintenance of himself and wife during their lives. He afterward brought an old deed, from which the scrivener obtained the boundaries of the land to be conveyed, and designated which of the two pieces of land set out in the old deed he wished to convey. He took the deed, when drawn, to the proper officer to have it acknowledged, and gave prompt and pertinent answers to the questions put to him during the ceremony of acknowledgment.

It seems satisfactorily established, therefore, that the deed was drawn at his request, executed and acknowledged voluntarily, and apparently with a full understanding, on his part, of its contents. During the time all this business was being done his mind

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appeared to be calm; he manifested none of the excesses of speech or manner which at times he had exhibited, and to all appearances was effectuating his own will in his own time and way.

He spoke of the deed after it was given, and explained why he had given Albert so much of his property. He alluded to the trouble that he and his wife might be to him, and remarked in that connection that he would have no more than his share.

I have not overlooked the medical testimony bearing upon the question of insanity. This testimony is quite unsatisfactory. Doctor Hoag saw him but once, in 1849, and the meeting was accidental, and not with a view to determine his condition. He had been in practice but five months, and laid no claim to skill or experience in mental diseases.

He gave no decided opinion.

Doctor Barnum saw him in 1851 or 1852, three years after the execution of the first deed; made an examination of him, with a view of testing his sanity, lasting "a very few minutes," and pronounced him insane. Dr. Cook saw him at the Lunatic Asylum at Utica in 1853, and he testified: "His mind was much impaired from long-continued mental disease. . . . He was incurable. The prominent symptoms were chronic mania." But he also frankly said that, from what he saw of Park Haviland, he could not tell that his disease existed for more than two years before he saw him.

On the other hand, Doctor Northrop, who was the family physician until 1852, and who made professional calls in 1847-8-9, testifies: "Mrs. Haviland was sick. I called occasionally. When I saw Park he appeared rational. He inquired about the disease and mode of treatment, and took a good deal of interest. In dangerous cases, he was always present. In trivial cases he was retiring. I prescribed for him in 1851. He came to my house on horseback, and related symptoms of urinary difficulty. I was satisfied of the difficulty, and made prescriptions. He said he had difficulty of voiding water. I prescribed burdock leaves. He inquired as to the effect of the medicine. He afterward said the medicine had operated as I described . . . He said his diffi-

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culty was overcome and he was relieved. I discovered nothing irrational, not the slightest aberration of mind. I think he was a sane man." Whether this was before or after the date of the deed is left in doubt; but at all events it shows that there were times, other than when the deed was executed, when Park Haviland was calm, self-possessed, and, so far as any judgment could be formed from conversation and outward appearance, in the full possession of unimpaired faculties. The causes which produced the condition in which Doctor Cook found him at the asylum were doubtless then at work; but that they, at that time, had destroyed his capacity for business, is not satisfactorily established. Mental, like bodily disease, is progressive; and to determine at what particular stage of it the mind loses its balance, and becomes in law unsound, requires, at times, minute personal observation, aided by the highest human skill. Little confidence, therefore, in my judgment, should be placed on the opinions of physicians on the subject of insanity, who have not devoted themselves to its study. And even then, at times, a diseased mind baffles the skill of the wisest.

There is probably no department of scientific investigation where observation and experience are of so much value, and where mere opinions, in cases not well defined, are so unsatisfactory. Mental disease manifests itself in multifarious forms. It may have its germ in what are supposed to be eccentricities of character, or constitutional idiosyncrasies, which, though harmless for years, in the end may destroy the reason.

There is no infallible standard by which sanity can be judged. The extremes of mental condition are easily distinguished. The sane man is not confounded with the drivelling idiot or the raging madman. But to determine where sanity ends, and madness begins, in a case like the one before us, is a problem of difficult solution. Little aid, therefore, is afforded by a physician who had been engaged in the practice of his profession but five months, or one who saw him but twice with a view of testing his soundness of mind, and even then but for a very brief period.

Doctor Cook's judgment is entitled to great weight, but he saw

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him for the first time in 1853, when he had passed into a hopeless state of insanity. What else he knew of him, was what he learned from the witnesses on the trial; and his opinion, therefore, was not founded altogether on his own personal observation. To adopt an opinion formed under such unfavorable circumstances, and on the strength of it hold, in the face of all the testimony affirming his soundness of mind, that Haviland was incapable of disposing of his own property, would be adopting a hazardous rule. I am therefore of the opinion that the testimony will not sustain the finding that Park Haviland was insane on the 14th day of June, 1848, when the deed to his son Albert was executed.

It is not without its effect upon the mind, in considering the question of insanity, that no steps were taken by the Plaintiff, or other member of the family, to have Park Haviland declared a lunatic, and prevent him from squandering his property, if he were considered at the time to be of unsound mind. When the first deed was executed the Plaintiff was more than thirty years of age, and other members of the family were still older. Albert had spoken openly of his intention to get a deed, and there was nothing secret or concealed in the manner of its execution. It seems to have been known generally in the neighborhood soon after its execution, and public rumor questioned the title long before the sale under the mortgage, whereby the Defendant acquired his title. The inference is irresistible that the Plaintiff knew that his father had conveyed the property, and it would seem unaccountable that no steps were taken to have him declared of unsound mind, if he supposed sufficient reasons existed therefor.

Neither is there satisfactory evidence in the case that the sale was forbidden. Some paper was handed to the referee, which he did not read at the time. It is not made a part of the case; and whatever it was, it was not made public at the time, and one of the sons of Park Haviland bid $3,500 on the property.

This sale was consummated by the delivery of the referee's deed early in 1852, and the purchaser entered into possession. These facts furnish some evidence of the estimate which the family put upon his capacity to dispose of his property, and suggest

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the manifest propriety of requiring of the Plaintiff, before he can set aside the conveyances at this late day, the most satisfactory evidence of his father's insanity when the conveyance was made.

The learned Justice who tried the case did not find that the deed was obtained by fraud or undue influence, and it is therefore unnecessary to consider that question.

The judgment of the General Term should be affirmed; but considering the nature of the case, it should be without costs.

Reversed.

JOEL TIFFANY,
State Reporter.

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FREDERICK T. CARRINGTON, RESPONDENT, v. LUCIUS B. CROCKER, APPELLANT.

Joint demand—Severance—Consent of debtor—Statute of Limitations.

Although, as a general rule, a demand due to several persons jointly cannot be divided, so as to allow the individual interests to be recovered in separate actions, yet it may be done by the agreement or consent of the debtor.

Where there had been an award in favor of two copartners, and the debtor had paid to one of the partners a certain sum in consideration that said partner had released one-half of said award, as being the portion coming to him, held, that the other partner might maintain an action for the recovery of the amount due on said award.

THE Respondent, Carrington, and Myron Pardee, were partners in trade, and in the course of their business the Appellant became indebted to them, as they claimed; and differences having arisen, either as to the existence of the indebtedness or its amount, the respective parties submitted themselves to an arbitration, the result of which was an award, on the 3d day of December, 1852, in favor of Carrington and Pardee, against Crocker, for the sum of $785.07.

In March, 1857, Carrington and Pardee brought an action in the Supreme Court against Crocker, to recover the amount thus awarded.

Crocker's defence was—1st, the Statute of Limitations; 2d, a release to him by Pardee of half the award in consideration of $200; and 3d, that Pardee was improperly joined with Carrington as a Plaintiff.

In June, 1859, the cause was tried. The Plaintiffs produced the award (which the Defendant admitted to have been made, December 3d, 1852), and offered to show that a payment had been made on it within six years.

The Defendant objected, on the ground that such proof was inadmissible under the complaint, it not having alleged a new promise within six years.

This objection was overruled, the Justice deciding that the

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complaint might be amended according to the facts. A receipt was then produced, endorsed upon a copy of the award, dated August 27, 1858, which receipt is quoted in the opinion below. This was the Plaintiff's case.

The Defendant introduced a release, dated April 8, 1859, made by Pardee to the Defendant, in consideration of $200, of his (Pardee's) one-half of the award, and insisted on the objection of misjoinder of parties; and the Court held that the objection might be remedied by striking out the name of Pardee as Plaintiff.

On the conclusion of the trial, the Court ordered judgment in favor of Carrington, as sole Plaintiff, for one-half of the award, and interest from its date, with costs.

Judgment was entered in favor of Carrington, from which the Defendant appealed to the General Term, where the judgment was affirmed, and thereupon the Defendant appealed to this Court.

A. Perry for Appellant.
Marsh & Webb for Respondent.

FULLERTON, J.—Although, as a general rule, a demand due to several persons jointly, cannot be divided so as to allow the individual interests to be recovered in separate actions, yet it may be done with the debtor's consent. The reason is, that the contract of the debtor is to pay the debt as an entirety to his joint creditors, and is therefore indivisible. The debtor, however, may, by a new contract, bind himself to account to the individual creditors for their respective interests in the demand, and such contracts are susceptible of being enforced.

The object of this rule is to protect the debtor from a multiplicity of actions, and the consequent increased expense; but if he chooses to waive the protection which the law has provided him, no legal objection can be urged against it. The first question in this case, then, is whether Crocker consented to sever the joint interest of his creditors, and agreed to pay each of them a moiety of the demand. The award was made December 3d, 1852, in favor of the Plaintiff and Myron Pardee, who at the time were co-partners in trade. On the 27th of August, 1858, the Defendant

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paid Pardee $200 on account of the award, and took the following receipt, endorsed on the award:

"Received, Oswego, August 27, 1858, two hundred dollars, in full for my one-half interest in the above award."

The terms of this receipt leave no doubt as to the intentions of the parties to split the demand; but they did not effectuate it so as to make it binding on the owners of the claim. The payment, and the receipt given for it, did not operate as a satisfaction of one-half the claim, for the reason that there was no consideration moving between the parties which could affect the claim beyond the amount paid. It is a well-settled rule of law, though it is seldom applied, that the payment of a smaller sum cannot operate as a satisfaction of a larger (Cumber v. Wane, 1 Smith's Leading Cases, p. 301, 6th Eng. ed.; S. C. 1 Strange, 426, and cases there cited).

At the time this sum of $200 was paid, the whole award, and the interest thereon, was due, and one-half the principal sum was far more than that amount.

There having been no new consideration for the promise to satisfy any part of this demand beyond the amount paid, and there being no release under seal, it follows that the whole award, with interest, less the $200 paid, was a valid demand against the Defendant, in favor of both Carrington and Pardee.

The receipt, therefore, did not split the demand, and the action was properly brought in their joint names, and could have been maintained, had it not been for the release of the 8th of April, 1859. That instrument, under seal, and expressing a new consideration, consummated the agreement between Pardee and Crocker, which before that had remained inchoate, and as between the parties to it, effectually extinguished one-half the whole demand, leaving Carrington to prosecute his action for his half.

That this was the intention of the parties to the receipt and release, there can be no doubt. When Crocker agreed to pay Pardee $200 as and for his one-half of the award, he doubtless meant that the other half should become the property of the Plaintiff.

The Defendant himself took the same view of the transaction;

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for in his original answer to the complaint, in which Carrington and Pardee were both Plaintiffs, he claims as a defence, that "Pardee was improperly joined with Carrington as a party Plaintiff," because he had "released *his* interest in the award." The Defendant appears to have deliberately agreed that the interests of his creditors should be separate, and he cannot complain if he is held to his contract.

Even if this were not so, the Defendant could not avail himself of the objection that there was a defect of parties Plaintiff in the amended complaint, after the name of Pardee had been stricken out.

This defect, if any, appeared on the *face of the complaint*, and the only remedy in such a case is by demurrer, and the objection cannot be taken by *answer* (vide Depuy and Others *v.* Strong and Others, post., p. 239).

Neither can it be maintained that the release of Pardee, of his one-half of said award, operated as a release of the whole.

It was not so intended by the parties, neither is that its legal effect.

The authorities cited to show that a release by one of several joint creditors of a debt or demand will bar an action by others, have no application in this case.

I cannot agree with the learned Judge, who delivered the opinion in the Court below, that the payment of the $200 did not take the case out of the Statute of Limitations. The reason given in support of that view of the matter is, that this action is for one-half of the demand, and upon that specific half nothing had been paid.

That proposition is true, but it does not by any means follow that the payment was not made on the demand as a whole. If the demand had been severed by a valid agreement before the payment was made, then the payment would necessarily have applied solely to the extinguishment of Pardee's interest.

But that was not the case.

I have already shown that the payment of the $200, when the receipt was given, extinguished the demand only pro tanto, and

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not one-half of it, and that Carrington was entirely unaffected by that payment and receipt, except so far as the amount paid went to satisfy the joint demand as a *whole*.

He had given no consent that Pardee's interest should be severed, and without such consent Pardee could not appropriate to his exclusive use the payment made; because Carrington could have compelled Pardee to account to him for one-half of the $200.

Adopting this mode of reasoning, which seems to be sound, the payment made was on account of the whole demand, and not on a moiety of it, and consequently the Statute of Limitations has not run against it.

The fact that Carrington assented to what had been done, by amending his complaint on the trial, and claiming to recover his half of the award, does not affect the application of this rule to the case.

The assent then given does not relate back, so as to change the character or effect of the payment.

It was still a payment on the demand, before the interests of the parties were severed, and affected the whole claim.

The judgment should be affirmed, with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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JAMES PATRICK AND ALEXANDER MACDOUGAL, APPELLANTS, v. BENJAMIN F. METCALF AND SAMUEL DUNCAN, RESPONDENTS.

Freight Money—Charterers—Master of Vessel—Payment to one of two Claimants —Effect of Trust.

Where two claimants for the same service apply for payment to the party bound to pay for such service, and one party is recognized as being entitled, and is paid, the other party does not, thereby, acquire any claim upon the party receiving payment, but must still enforce his claim, if he have any, against the party bound to pay for such service.

PARKER, J.—This action was brought in the Superior Court of the City of New York, for the recovery of a sum of money received by the Defendants from officers of the government of the United States, for the transportation of certain government stores from New York to the Navy-yard at Mare's Island, California.

The Plaintiffs were nonsuited upon the trial, and the General Term sustained the ruling, and gave judgment for the Defendants.

From the pleadings and evidence it appeared that the firm of Wells & Emanuel, of the city of New York, had, before the 5th day of July, 1859, chartered and hired a certain vessel, called the "B. D. Metcalf," for a voyage to be made from New York to San Francisco, for the transportation of goods and merchandise. That early in July, 1859, said firm procured from the United States naval storekeeper at New York the freight mentioned in a bill of lading executed "for the captain," by the said firm, consisting of government stores, to be transported upon said vessel to Mare's Island, California, at a specified rate, amounting in all to $1,882.84, payable in New York, upon return of the bill of lading, signed by the commanding officer at Mare's Island, certifying to the delivery of the articles named therein. That on the 21st of July, 1859, the said firm, in consideration of $1,500 paid them by the Plaintiffs, who were consignees at San Francisco of said freight,

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endorsed upon said bill of lading an order to pay the amount of freight to the Plaintiffs, and delivered the same, so endorsed, to the Plaintiffs. That the said stores were transported in said vessel to Mare's Island, and delivered to the commanding officer of the United States Navy-yard at that place, who certified upon the bill of lading the delivery of the articles therein named, in good order, except a few articles damaged or lost, to the amount of $32.87. That upon the return of the bill of lading to New York, the naval storekeeper at that place deducted said sum from the freight bill, and certified the balance, $1,849.97, as the correct charge for said freight, which was approved by the commandant of the navy-yard, on which freight bill, so certified, the said firm endorsed an order to pay the amount of freight therein mentioned to the Plaintiffs.

That subsequently thereto, the Defendants, on behalf and in the name of the captain of the vessel, forbade payment for the freight to the Plaintiffs, and presented to the naval storekeeper at New York a bill for the same in the captain's name, as payable to him. This bill was duly certified by the storekeeper and approved by the commandant, and upon a bond of indemnity being executed to the government, was paid to the Defendants for the captain, and receipted by them in his name. This claim, so made by the Defendants, was based, as it would seem, upon the ground that Wells & Emanuel were not, under the terms of their charter party, entitled to the moneys arising from this freight, but that the same belonged to the owners of the vessel.

I am not able to see how the facts in the case show any cause of action against the Defendants in favor of the Plaintiffs.

If it were admitted that the navy agent should have paid the money to the Plaintiffs, and not to the Defendants, still there is no such relationship between these parties as entitles the Plaintiffs to claim of the Defendants the money paid to them. The Plaintiffs' counsel suggests that the money paid was a trust fund in favor of the Plaintiffs, of which the Defendants had notice.

Although it is true that the Defendants had notice of the Plaintiffs' claim to be paid for the freight in question, the counsel

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is mistaken, I think, in regarding the money paid to the Defendants as a trust fund. The proper officers of the government had audited the Plaintiffs' bill for the freight, but that was not an appropriation of the money paid to the Defendants to the payment of the Plaintiffs' bill. There is nothing to show any such appropriation of a particular fund for the Plaintiffs' benefit, as to raise a trust in their favor. When two claimants for the same service apply for payment to the party bound to pay for the same, one of whom is recognized as the person entitled to payment, and is paid to the exclusion of the other, who is in fact alone entitled to payment, the party so excluded derives no right from the circumstances to the money paid to his competitor. It is not money received to his use, for the payment thus made does not, in any respect, affect his right still to call on his debtor for payment to himself. And it makes no difference whether such debtor is an individual or the government. The obligation of the debtor to him still remains unaffected.

The case of Bradley v. Root (5 Paige, 632) is relied upon by the Plaintiffs' counsel to sustain the Plaintiffs' claim to the money from the Defendants. That case rests upon a very different state of facts from this, and well shows under what circumstances a trust may be held to arise in respect to money paid to one person, to which another is entitled. In that case the holder of a mail contract from the Post-office Department assigned it to the Complainant, who took upon himself the duty to carry the mail according to the contract, during its continuance, and was to receive therefor all the moneys which should become payable under the contract, according to the terms thereof. No notice of this assignment was given to the Postmaster-General. Afterwards, the assignor, who was insolvent, gave the Defendant an order upon the Postmaster-General for the moneys which might become payable on the contract, to indemnify him against a responsibility which he had incurred as endorser for the assignor. The Defendant took the order, having notice of the assignment. After the moneys had been earned by the Complainant, under the contract, the Defendant presented his order to the Postmaster-General, and re-

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ceived thereon $430; and it was held by the Chancellor that he was equitably bound to pay it over to the Complainant.

These were the elements of a trust. The Defendant, knowing that the Complainant was assignee of the contract upon which the money was payable when he took his order, and that the Complainant had himself earned the money by performance of the contract when he presented the order, received money which, from want of notice to the Postmaster-General of the assignment of the contract, paid for the services rendered by the Complainant, and satisfied the contract under which they were rendered. This money, which thus extinguished the Complainant's claim upon the government for his services, and which, as between him and the Defendant, belonged to the Complainant, was in equity his money, and the Defendant thus obtaining it while cognizant of the Complainant's equitable right to it, was well regarded as holding it in trust for the Complainant.

In the case at bar, the Plaintiffs' rights being in no respect affected by the payment made to the Defendants, the money paid cannot be regarded as Plaintiffs'. There is no ground for making Defendants trustees of the money for the Plaintiffs, nor for holding that it is money received to the Plaintiffs' use.

The judgment appealed from is right, and should be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THOMAS R. H. DEPUY, ET AL., APPELLANTS, v. AUSTIN STRONG, ET AL., RESPONDENTS.

Trespass—Tenants in common—Joinder of parties—Demurrer—Answer.

In an action to recover damages for an injury done to the possession of lands held by tenants in common, all co-tenants must be joined as parties Plaintiff, &c.

If in such action there is a non-joinder of parties Plaintiff, which appears upon the face of the complaint, advantage thereof can only be taken by demurrer.

Where, in such case, a demurrer is interposed, and is overruled by the Court, the Defendant should appeal; if he answer, he abandons his demurrer and cannot afterward have the benefit of it, on appeal.

To set up by answer a defence which the Code requires to be by demurrer is a nullity and cannot be made available.

ACTION to recover damages for entering upon lands, cutting timber, and removing therefrom timber and bark.

The complaint set forth that Plaintiffs owned certain individual interests in the lands in question, with the other necessary averments, charging the Defendants with trespassing thereon. The Defendants demurred to the complaint, on the ground of a defect of necessary parties as Plaintiffs.

The demurrer was heard at Special Term, and overruled, with leave to Defendants to answer upon terms. The Defendants answered the complaint, and, among other defences, insisted upon the non-joinder of parties Plaintiff. Upon the trial of the issues it was shown that Plaintiffs were tenants in common in the lands trespassed, with other parties.

Upon this ground the Plaintiffs were nonsuited; and after affirmance of the judgment by the General Term, sitting in the Third District, appealed to this Court.

James Matthews for Appellants.
Niven & Thompson for Respondents.

GROVER, J.—The law in this State, prior to the enactment of the Code, was settled, that tenants in common must all join in an

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action of trespass to recover damages for injuries to real estate held in common (Hill v. Gibbs, and cases cited, 5 Hill, 56). The rule applied to personal, and not to real actions. It was founded upon the idea that it was an injury to the possession, and that as the possession of one tenant in common was regarded as the possession of all, the injury was to their joint right, and therefore all must join in prosecuting the remedy. The law having been so determined it must still be so held, unless changed by the Legislature. It is claimed that section 111 of the Code has changed the law in this respect. That section provides that every action must be prosecuted in the name of the real party in interest, with exceptions not applicable to the present case. The only change effected by this provision was, to enable Courts of law to treat assignments of certain choses in action as transferring the legal title which, at common law, transferred only the equitable. The rule at the common law was, that the owner of the legal title must sue. Section 119 has, I think, no bearing upon the question in this case. That provides that those united in interest must be joined as Plaintiffs, or Defendants; but if the consent of any one who should have joined as Plaintiff cannot be obtained, he may be made a Defendant, the reason thereof being stated in the complaint. This clearly does not authorize the omission of a party which the existing law required. It is said that it would be incongruous to make one tenant in common a co-Defendant with a trespasser upon his refusal to join as Plaintiff. This is so, but the answer is, that that is the only remedy provided by the Code for a case where, before, if he refused to join as Plaintiff, his co-tenant could not maintain an action at all, unless the Court, upon the special facts, permitted his name to be used as Plaintiff. I think it clear that the Code has not changed the law as to the requisite parties in this class of actions. The question arises as to the mode in which the Defendant may avail himself of the omission to join a co-tenant as Plaintiff. Previous to the Code this could only be done by demurrer, when the defect appeared upon the narr., or, in case it did not, by plea in abatement. The latter plea has been abolished by the Code, the only mode provided for presenting a

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defence being by demurrer or answer. Section 144, among other things, provides that a Defendant may demur to the complaint, when it shall appear upon the face thereof that there is a defect of parties Plaintiff or Defendant. In the present case the defect of parties Plaintiff did appear upon the face of the complaint. The Plaintiffs alleged that they owned an undivided interest in the land.

The remaining interest must, of necessity, have been owned by others, either as joint-tenants, or tenants in common with the Plaintiffs.

In either case, the co-tenants were necessary parties. One mode of presenting this question, provided by the Code, was by demurring to the complaint. This the Defendants interposed. The Special Term erroneously overruled it, and gave the Defendants leave to answer. The Defendants answered, setting up, among other defences, the defect of parties Plaintiff. This was an abandonment of the demurrer, and placed the case in the same position as though none had been interposed. It remains to inquire whether, in case the defect does appear upon the face of the complaint, it can be made available by answer. This inquiry is answered by section 147. That provides that when any of the matters enumerated in section 144 do not appear upon the face of the complaint, the objection may be taken by answer. This clearly implies that when the defect appears upon the face of the complaint, it is available only by a demurrer to the complaint. This being so, setting it up in the answer is a mere nullity.

The Defendants, instead of answering, should have appealed from the judgment ordered upon the demurrer. It has been repeatedly held by this Court that defects of this description must be insisted upon in the mode provided by the Code, or they are waived (33 N. Y. 43; 32 id. 685).

The judgment appealed from must be reversed, and a new trial ordered. If the Defendant has any relief under the peculiar facts of this case, it is by obtaining leave in the Supreme Court to withdraw his answer, and that judgment be entered upon the demurrer.

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FULLERTON, J.—The action was brought to recover damages for trespass on lands. The Plaintiffs, in their complaint, claimed to be owners in fee of considerably less than a moiety of the lands on which the injury was committed. The Defendants demurred to the complaint for non-joinder of all the tenants in common, either as Plaintiffs or Defendants. The demurrer was held bad, and the Defendants had leave to answer, of which leave they availed themselves. The issues were tried before Mr. Justice Hogeboom and a jury, and a verdict of thirty dollars rendered for the Plaintiffs.

The Defendants appealed to the General Term, and a new trial was ordered, the verdict of the jury being set aside, on the ground that tenants in common could not sever in an action for trespass on their lands so held in common.

The cause was again tried before the same Justice and a jury, and the Defendants moved for a nonsuit, on the ground that the Plaintiffs had failed to establish title to the premises; also that the testimony showing that there were other persons, owners, as tenants in common of the premises in question, the action could not be maintained. The motion for nonsuit was granted, upon the ground that tenants in common must all be joined as parties in actions for trespass upon lands owned in common. The Plaintiffs appealed to the General Term, where a new trial was denied, and from that decision they appeal to this Court.

It must be conceded that before the Code the rule in this State was, that tenants in common must join in actions to recover for injuries to the realty (Austin *v.* Hall, 13 John. 286; Low *v.* Mumford, 14 John. 426; Decker *v.* Livingston, 15 John. 479; Hill *v.* Gibbs, 5 Hill, 56, note). This rule has not been altered by the Code. The only change it has made is in the mode of taking advantage of a defect of parties. Under the old system the only remedy was by plea in abatement; and if that were not interposed, a tenant in common could still recover. The Defendant could show on the trial that there were others interested in the claim, not by way of bar, but to limit the Plaintiff's recovery to his aliquot part of the damages sustained. Now, the Defendant

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may have his remedy by demurrer, if the defect appear on the face of the complaint, or by answer if it does not.

The only question in this case, as I view it, is whether, when the defect of parties appears on the face of the complaint, the Defendant can omit to demur, and take advantage of it by answer, and this point seems to be well settled by authority (Dennison v. Dennison, 9 How. Pr. R. 247; Osgood v. Whittlesey, 10 Abb. Pr. R. 134; Ingraham v. Baldwin, 12 Barb. 18; Baggott v. Boulger, 2 Duer, 169; Zabriskie v. Smith, 3 Kernan, 336).

In this last case, Judge Denio, in discussing the question, remarks: "A dilatory defence, which a plea in abatement is considered to be, is not favored; but he that is entitled to avail himself of it must interpose it promptly, according to the established forms. Here the facts were fully disclosed by the complaint, and the Defendant *could have demurred.* The authority to object by way of answer is, in terms, limited to cases where the fact does not appear in the prior pleading. When, therefore, the last section [148] which I have quoted declares, that if the objection is not taken by demurrer or answer, it shall be considered as waived, it means that if it be not taken by demurrer where that mode is proper, or by answer, in cases where that is the appropriate method, it is waived. This construction will give full effect to all the language, and will, besides, compel the Defendant to take his ground with the promptness inculcated by the rule of pleading to which I have referred."

This question was again considered in this Court in Merritt v. Walsh (32 N. Y. 690), and Zabriskie v. Smith was there cited as settling the rule. The question is therefore no longer open for consideration. Where a demurrer can be interposed for a defect of parties, the Defendant is confined to that remedy alone, and it is only where evidence is necessary to make the defect apparent that an answer to that point is permitted.

The complaint in this action distinctly alleges that each of the Plaintiffs is the owner in fee of a specified fractional part of the lands on which the trespasses were committed, the sum of which parts is much less than the whole of the lands; thereby admitting

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that there were other parties jointly interested with the Plaintiffs in the claim sought to be recovered, and thus bringing the case directly within the rule established.

The Defendants were therefore right, in the first instance, in interposing a demurrer to the complaint, and when it was overruled, they should have corrected the error by an appeal. Having omitted to do so, they have acquiesced in the judgment, and are concluded by it. If the merits of that decision were before us in this controversy, we should correct the error, but they are not; and the case stands precisely as if no demurrer had been interposed. That being so, and holding that the question could not be raised by answer, the Plaintiffs were at liberty to recover their aliquot proportion of the damages proved on the trial.

The judgment of the General and Special Terms should be reversed, and a new trial granted, costs to abide the event.

All reverse.

JOEL TIFFANY,
State Reporter.

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WILLIAM BUSWELL, APPELLANT, v. HORACE J. POINEER, RESPONDENT.

Parol Evidence—Explanation or Contradiction of Receipt—Payment by Note—Fraud.

A receipt may be contradicted or explained by parol evidence.

S. Hand for Appellant.
W. A. Beach for Respondent.

DAVIES, CH.J.—The Plaintiff, as the assignee of Buswell & Son, lumber merchants of Troy, brings this action to recover the amount of four several bills of lumber sold to the Defendant, a resident of Newark, New Jersey, in the summer of 1856. The answer of the Defendant admits the sale and delivery of the lumber to him, as stated in the complaint, but sets up as a defence that the Defendant paid the said firm of Buswell & Son in full for each of said claims; that such payment was made by and with several promissory notes of the firm of Mann, Kendrick & Co.; and by them accepted in full payment and satisfaction of each of said claims, and of every part thereof. The only issue, therefore, formed by the pleadings was the fact of such payment in the manner set up in the answer.

The affirmative of this issue was upon the Defendant. He admitted the purchase by, and sale and delivery to him of the property of the Plaintiff's assignor, and he sought to discharge himself of his liabilities to pay for the same by setting up payment. To maintain his defence he put in proof four several receipts of the Plaintiff's assignor, attached to the said four bills of parcels, three of which were in the words: "Received payment, by note, 3 months," and the last, "Received payment of M. K. & Co.'s note, 4 months." It appeared in proof that the notes so given were those of the firm of Mann, Kendrick & Co. One of the firm of Mann, Kendrick & Co., which firm was located at and transacted business in Troy, testified on the trial that the Defendant usually came to Troy and selected such lumber as he wanted; "the

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bills were sent to us, we gave our notes, and charged the lumber to him; usually, the next time he came up he gave us his notes."

The Plaintiff gave parol evidence to contradict that part of the receipt given by Buswell & Son which states that the notes of Mann, Kendrick & Co. were received by Buswell & Son as payments. The Defendant's counsel objected to such evidence, and the Court overruled the objections, and the Defendant's counsel excepted.

The Court charged the jury that the said receipts might be explained by parol testimony, and to this part of the charge the Defendant's counsel also excepted. The Defendant also excepted to that part of the charge which held and decided, that if the Defendant offered paper which he knew, or had good reason to believe, was not good, and that Buswell & Son did not know it, and they agreed to take it in absolute payment, their agreement would be avoided by the fraud, and the Defendant would remain liable.

The jury found a verdict for the Plaintiff, and judgment thereon was reversed at the General Term, and a new trial ordered.

The first question presented for consideration is, whether the rulings of the Judge, in admitting parol evidence to explain the receipts, were correct. We think the authorities in this State, and the decision of this Court, leave no room for further question on this point. Without recurring to all the cases in the books on this subject, it will only be needful to call attention to a few of the most leading.

In Tobey v. Barber (5 Johns. 68), a receipt had been given and endorsed on the counterpart of a lease for $163, "and in full for the second and third quarters' rent."

The Plaintiff offered to prove that the Defendant had procured one Coffin to give a note, payable to the Plaintiff, or order, for $115.68, at the bank of Columbia, in four months, and dated the same day as the receipt, and that it formed a part of the receipt; that Coffin failed before it became due, and took the benefit of the Insolvent Act; and that the note had not been paid. This evidence was objected to, and admitted. The Judge charged the jury that a receipt was not conclusive evidence, but might be explained by parol.

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The Court held that a receipt is an exception to the general rule, that a writing cannot be explained or contradicted by parol, citing Ensign v. Webster (1 Johns. Cases, 145), and that the parol evidence was admissible. The Court say: "The parol evidence was, then, admissible in this case, to show that the receipt of the 24th of September, 1803, though purporting to be in full for two quarters' rent, was founded partly on a note given by one Coffin to the Plaintiff, by the procurement of the Defendant; and that Coffin became insolvent before the note fell due, by which means the note was not paid. The taking of the note was no extinguishment of the debt due for the rent. It is a rule well settled, and repeatedly recognized in this Court, that taking a note either of a debtor or of a third person for a pre-existing debt is no payment, unless it be expressly agreed to take the note as payment, and to run the risk of its being paid." The Court in its opinion refers to the case of Murray v. Gouverneur and Kemble, decided in the Court of Errors, in 1800, where it was held that receipts were explainable, and that a bill was not a discharge of a precedent debt, unless by express agreement; and that a receipt of a bill *as cash* was not sufficient evidence that the bill was taken as an absolute payment. This case is cited with approval in Egleston v. Knickerbacker (6 Barb. 458); and in that case it was decided that the paper writing sought to be explained by parol evidence was the agreement between the parties, and not a receipt, and the head-note is: "Parol evidence is inadmissible to contradict or explain a written agreement." This case was relied upon as the basis of the decision of Coon v. Knap (4 Seld. 402). There it was held that parol evidence was not admissible to explain a release, and that the paper offered in that case was not a simple receipt, which it was conceded could be explained or varied by parol evidence. The paper writing in that case was in effect a release of the Defendant from all liability occasioned by that transaction. In Filkins v. Whyland (24 N. Y. 338), this Court had occasion to consider the question whether a writing in this form—"F. bought of W. one horse, $150; received payment, W."—given upon the purchase of and payment for the horse, was a mere receipt, and

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held that the same was a mere receipt, and not a contract or bill of sale, so as to exclude parol evidence of a warranty of soundness of the horse by the vendor. Judge Wright, in his opinion in this case, says: "The paper in this case is to be construed as a simple receipt, delivered and accepted as evidence of payment, and not the contract by which the title to the horse was transferred. The paper cannot be read as a present agreement of sale. It contains no stipulations to sell or to buy, nor declares any present undertaking by either party. The vendor acknowledges payment, but he does not profess, by the writing, to sell. The vendee does not execute, but accepts it. It recites the fact of a past sale. It admits that a sale has been had, but does not effect one. A merchant's bill of items of goods sold, made up and receipted in the same form, has never been regarded as the written contract of sale." These observations are pertinent to the case at bar, and conclusively show that the four paper writings relied upon by the Defendant to sustain the defence set up in his answer, were neither releases, contracts of sale, nor agreements, but simply receipts which, upon most abundant authority, could be explained by parol evidence. And the Court properly overruled the objection to the admission of such evidence. The exception to the charge of the Judge that such receipts might be explained by parol testimony is equally untenable. The General Term of the Supreme Court was incorrect in holding that there was error in those particulars, and reversing the judgment, and ordering a new trial. This would make it unnecessary to examine the exception taken to the Judge's charge in reference to the alleged fraud of the Defendant, in transferring the notes of Mann, Kendrick & Co., knowing that the same were not good, and would not be paid. The order granting a new trial should be reversed, and the judgment on the verdict should be affirmed, with costs.

All concur, except GROVER and PARKER, JJ.

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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JAMES T. HOWE, Respondent, v. THE BUFFALO, NEW YORK & ERIE RAILROAD CO., Appellant.

Expulsion of Passenger from Car—Principal and Agent—Obligation to Indemnify—Former Judgment as Evidence—Note of Surety in Satisfaction.

When the conductor, by obeying the instructions of the railroad company, to enforce the rules and regulations of the company, has been held liable, upon the ground that the company had no authority to make and enforce such rule, he may recover of the company the damage he may have sustained in consequence of such obedience.

Appeal from the Supreme Court. The action was to obtain indemnity from the Defendant for damages to which the Plaintiff was subjected, as a conductor of the company, by obeying its order in expelling a passenger from its cars for non-payment of his fare.

The cause was tried at the Steuben Circuit, before Mr. Justice Johnson, without a jury, who rendered judgment in favor of the Plaintiff for $356.68.

The facts were these: The Plaintiff was a conductor on the Defendant's road in January, 1858, and he was charged with the duty of collecting and receiving fare from the passengers. He was instructed by the company not to receive or accept in payment of fare any ticket purporting to be issued by another corporation—the New York & Erie Railroad Co.—and endorsed, "Good for six days only, from date," after the time so limited; and he was required to exact payment of fare from any passengers presenting such tickets. He understood and believed that the Defendant had the right to give this order, and that he was bound to obey it. On the 27th of that month a Mr. Hotchkin presented to the Plaintiff a ticket of that description, more than six days from its date, as evidence of the payment of his fare. The Plaintiff refused to accept it, demanded the fare, and upon the refusal of Hotchkin to pay it, stopped the train and put him off, believing he had the right to do so—using no more force than was necessary.

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Hotchkin subsequently brought an action in the Supreme Court for the injury and detention occasioned by this act of the conductor. The Defendant was immediately notified of the suit, and employed and paid the attorney and counsel who defended it. Hotchkin recovered judgment for $312.68, which was docketed on the 20th of May, 1859. Execution was issued against the body of the Plaintiff, under which he was arrested and imprisoned. The judgment was assigned by Hotchkin to Daniel Ramsay, to whom the Plaintiff gave his note for the amount, with interest, which was accepted in full payment and satisfaction by Mr. Ramsay. The Plaintiff was thereupon discharged from imprisonment.

Upon these facts the Judge held that the Defendant was liable to the Plaintiff for the amount. The judgment was affirmed on appeal, the opinion of the Court being delivered by Mr. Justice Welles. The case is reported in 38 Barb. 125.

A. P. Laning for Appellant.
David Rumsey for Respondent.

PORTER, J.—The Plaintiff acted in good faith, and in obedience to the Defendant's instructions. He supposed the company to possess the authority it assumed, and he found himself involved in a serious liability by fidelity in the discharge of a duty imposed by his principal, where he was wholly free from intentional wrong. Under these circumstances the company very properly assumed the burden of defending his act. Whether the judgment recovered against him was right or wrong, is a question that does not arise on the present appeal. If it was right, the Defendant should have paid it without exposing him to imprisonment for an act done in good faith in the interest and by the order of the company. If it was wrong, the error should have been corrected by a review of the judgment. The Appellant chose to abandon the defence, and permit him to be the sufferer. The Court below was right in holding that the Plaintiff was entitled to redress. There is an implied obligation on the part of the principal to indemnify an innocent agent for obeying his order, where the act would have

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been lawful in respect to both, if the principal really had the authority which he claimed (Adamson v. Jarvis, 4 Bingham, 66; Coventry v. Barton, 17 Johns. 142; Powell v. Trustees of Newburgh, 19 id. 284, 289; Story on Agency, §§ 339, 340).

The record of the judgment recovered by Hotchkin was properly admitted in evidence (Kip v. Brigham, 6 Johns. 158; Blasdale v. Babcock, 1 id. 517). There was no error in permitting proof of the fact that Plaintiff used no more force than was necessary in removing Hotchkin from the car. It appeared, presumptively, from the record, that the judgment was rendered on the ground that the removal itself was unlawful, and not on the ground of excessive force in the exercise of a legal right; but it could not prejudice the Defendant to exclude the possible conclusion that the latter was the ground of recovery (Dunckel v. Wiles, 1 Kernan, 420; Gardner v. Buckbee, 3 Cowen, 120).

There is no force in the objection that the assignee of the judgment accepted the note of the Plaintiff in lieu of actual payment. In respect to the right of the latter's indemnity, he stood to the Defendant in the relation of a surety; and it is well settled that in such a case, the acceptance by the creditor of the note of the surety in satisfaction of the demand is equivalent to actual payment (Chace v. Hinman, 8 Wend. 456; New York State Bank v. Fletcher, 5 id. 85; Barclay v. Gooch, 2 Espinasse's R. 571; Clark v. Pinney, 6 Cowen, 297; Wetherby v. Mann, 11 Johns. 518).

Other points were urged in behalf of the Appellant, but we think them plainly untenable.

The judgment should be affirmed.

All the Judges concurring, except BOCKES, J., who took no part in the decision.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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WILLIAM MILTON v. HUDSON RIVER STEAMBOAT COMPANY.

Breach of Contract—Contributory Negligence—Measure of Damages.

Where a steamboat company contracted to tow a canal-boat loaded with staves, &c., to New York, and to give the boat a particular position in the tow, but instead gave it a different and more dangerous position, in consequence of which a portion of the cargo was lost, but which loss would not have happened had the captain and crew of the canal-boat not been guilty of negligence and unskilfulness in the management of the same, the Court held that notwithstanding the breach of contract on the part of the steamboat company, the owner of the cargo, &c., could not recover, because of the negligent and unskilful conduct of his servants and agents in the management of the canal-boat.

THIS action was brought by the Plaintiff to recover damages for the loss of a portion of the cargo of the canal-boat Caloric, which was washed overboard and lost on the voyage from Albany to New York.

The referee found "that in the month of October, 1860, the Plaintiff chartered and hired the canal-boat Caloric, for the purpose of transferring a cargo of staves and headings from Onondaga county to New York, paying the captain a price per day for his own and his crew's services; that the boat was several years old; was open, without combings on her sides to protect her from the running waves, and was not strong; that the Defendants did contract to tow the boat from Albany to New York, and that she should be placed between two other boats; that in locating the boat in the tow, the Defendants did not place her between two other boats, but placed her on the outside of a tier of five boats, being on the right or westerly side going down the river; that an easterly wind was prevailing, and by the waves and storms a portion of the cargo was washed away and lost, and that certain amounts were expended in preserving other portions of the cargo."

The referee further finds "that the crew of the Caloric did not exercise proper care over the boat in the position in which it was placed." He further finds "that if the Caloric had been placed

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and fastened between two deck boats in the tier in which she was towed, notwithstanding the want of care in trimming the boat, and notwithstanding the want of skill or otherwise on the part of her crew, the loss of property would not have occurred, and the Plaintiff would not have sustained the injury complained of."

The referee reported in favor of the Plaintiff, and the judgment upon his report was affirmed by the General Term of the Fifth District.

The Defendants now appeal to this Court.

George P. Comstock for Appellant.
Daniel Pratt for Respondents.

HUNT, J.—The Defendants contracted to tow the Plaintiff's boat, with her cargo, from Albany to New York, and to use care and diligence in the performance of this undertaking. The former portion of this agreement was express. The latter was implied. The Defendants made a further express agreement that the boat should be placed in a particular position in the fleet of boats of which she formed a part.

The boat was towed to her destination, but was placed in a different position from that agreed to be assigned to her.

Her cargo was lost and damaged by the waves and storms upon the river while in this transit.

This injury would not have occurred had the boat been placed in the position agreed upon.

Here is an agreement duly made, a breach, and an injury resulting from such breach. Stopping here, the Plaintiff's cause of action is perfect.

The Defendants now answer to the claim thus made upon them, that it is true the contract was made as alleged, and the loss occurred as stated, and that it would not have occurred had the boat been located as agreed upon; but they say further, that no loss would have occurred to the boat or her cargo, even as she was placed, if proper care had been exercised by those in charge of her. The question is thus presented whether the Defendants' failure to perform the contract as agreed on their part relieved

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the Plaintiff from the necessity of care and attention on his part. The referee's finding of facts is conclusive upon us, and is to be justly and fairly construed.

I construe it to mean that the Caloric was not perfectly trimmed by those in charge of her; that there was a want of skill and a want of care in her management which caused the loss in question.

The referee does not say this in precise words, but his language is fairly and justly open to this interpretation and to none other.

"I find that the crew of the Caloric did not exercise proper care over the boat in the position in which it was placed. I further find that if the Caloric had been placed and fastened between two deck boats, in the tier of boats in which she was placed, notwithstanding the want of care in trimming the boat, and notwithstanding the want of skill or otherwise on the part of her crew, the loss of property would not have occurred," &c.

Want of care in trimming the boat, and want of skill in her management, are here clearly stated; and the implication is strong that they caused the loss, as the referee says that notwithstanding this, the loss would not have occurred if she had been placed between two other boats.

While the general rule is too familiar for discussion, that a party cannot recover for the loss of his property, or from injury to his person, when his own negligence has to any extent contributed to the result, it is insisted that the principle does not apply to a case like the present.

(Mackay v. New York Central R. R. Co., 35 N. Y. 75; Ernst v. Hudson R. R. R., id. 9; Deyo v. N. Y. Central R. R. Co., 34 N. Y. 9; Brown v. Same, id. 404; Tonawanda R. R. Co. v. Munger, 4 N. Y. 349; S. C. 5 Denio, 255; Railroad Co. v. Aspell, 23 Penn. R. 147.)

It is said that the Plaintiff may have known his crew to have been careless or ignorant, and may have intended to guard himself in this respect by securing an inside position for his boat.

Had the present been an action upon a policy of insurance, this argument would have been quite satisfactory. In such a case,

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negligence of servants or agents is one of the perils insured against, and this is well understood by both parties to the contract. The Defendants did not undertake such a risk in the contract in question; but they had a right, as in all similar contracts, to look for reasonable care and attention on the part of the Plaintiff in the management of his property.

The Plaintiff could only have obtained the benefit of such an argument by an express agreement with the Defendants that they would be liable for damages, notwithstanding the occurrence of any negligence on the part of the Plaintiff and his agents during the voyage. Doubtless it was competent to the Defendants to make such a bargain, but they do not appear to have done so in the present instance. They were not insured against the waves and storms. They are not common carriers (3 Hill, 9; 7 id. 533; 2 Coms. 204; 4 Seld. 375).

We are to look, then, at the actual cause of the loss, to determine the liability and its extent.

Wilson v. The Newport Dock Company (1 Law Reports, Court of Exchequer, 177, 191) is strongly in point.

In that case it appeared that the Defendants were the proprietors of a dock on the river Usk, connecting nearly with the ocean, which was used for the reception of ships inside the dock for the purpose of repair. On a day and a time named they agreed with the Plaintiff to receive and repair his ship. The ship was towed down to the dock at the time appointed, but owing to a breaking of the gate-chains of the dock the Defendants could not receive her.

A discussion arose between the pilot and the captain as to what should be done with the vessel; whether she should be taken up the river to where she came from, or to a place called West Point, or into deep water, or remain where she was. Eventually the anchor was cast, and the ship remained where she was, outside of the dock. In a few hours she grounded on a sand bank, and broke her back. The action was to recover for the damages occasioned by the injury. The jury found affirmatively that neither the captain nor the pilot was guilty of negligence, but were unable to

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agree upon an answer to the question, what ought to have been done with the ship. On that finding a verdict was directed to be entered for the Plaintiff. On appeal to the Court of Exchequer, it was held that the finding of the jury was not sufficient to enable the Court to draw any conclusion as to whether the loss was occasioned under circumstances rendering the Defendants liable for the damage to the ship, as a consequence of their breach of contract, and a new trial was ordered. Notwithstanding the admitted breach of a precise contract, and notwithstanding the affirmative finding that neither the captain nor the pilot was in fault, Pollock, C. B., says: "If there was any place of safety to which the vessel might have been taken, and could have been taken, we think the Plaintiff is not entitled to recover. The jury could not agree on an answer to this question. If they had found this question in the affirmative, we think the Plaintiff was clearly not entitled to recover, and we presume the Judge would have directed a verdict for the Defendants." If it had been conceded, as in the case before us, that the captain had been negligent or in fault, it is manifest that a verdict would have been ordered for the Defendant.

The question is essentially one of damages. The Defendants were guilty of a breach of their contract, and therefore liable at least to nominal damages. When a claim to further damages is preferred, the question at once arises, did the damage claimed flow directly from a breach of the contract, or was it a remote result; or was it caused or aggravated by the conduct of the Plaintiff? If within the latter suggestion, although it may have been proximate, the Plaintiff cannot recover. The question of proximate or remote damages was learnedly discussed in the case of Wilson v. The Newport Dock Co. (sup.), and in Hadley v. Baxendale (9 Exch. R. 341); and in Boyd v. Fitt (14 Irish Com. Law Rep. 43), and has been examined in this Court in Griffin v. Colver (16 N. Y. R. 494); and in Hamilton v. McPherson (28 N. Y. R. 72).

The rule is established by these cases that the damages to be recovered are those that flow naturally and directly from the breach of the contract; that they do not embrace speculative

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profits, nor damages which could have been avoided by the reasonable exertions of the party injured; and that if such damages are enhanced by his negligence or wilfulness, the increased loss justly falls on him.

This principle is applicable to the present case. The Defendants are liable to pay all damages which the Plaintiff has sustained by a failure to locate his boat between two other boats; but the damages must have been the immediate result of such failure to locate, and not have been caused or aggravated by the Plaintiff's own negligence. It appears expressly, however, that if his servants and agents had made reasonable exertions to protect his property, the loss in question would not have occurred. He cannot, therefore, call upon the Defendants to respond.

It is urged by the Plaintiff's counsel that this principle of contributory negligence does not apply in cases of contract, but only to cases where the action is founded on tort. Many of the cases above recited were upon contract. The case of Hamilton *v.* McPherson (sup.), was that of a contract to transport oats from Perth, in Canada, to Oswego, within a given time. In consequence of failure to transport them within the appointed time, the oats became heated and mouldy. Here was a case of contract, and where the damages resulted directly from the breach; and leaving the transaction as I have thus far stated it, the Plaintiff was entitled to recover the damages to the oats.

When, however, it further appeared that, notwithstanding the breach as to time, the oats would not have been injured if they had been handled and stirred, it was held that the damage resulted as well from a failure to bestow the required care upon them as from the delay in transportation, and that the Plaintiff could not recover. In many of the railroad cases already cited, and the others with which our reports abound, the action is based upon an express contract safely to carry the Plaintiff or his property, and an alleged breach of this contract; and it is in such cases that the principle of contributory negligence is laid down.

The case of Davis *v.* Garrett (6 Bingh. R. 716), cited by the Plaintiff, is an authority on the point of the nearness of the

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damages caused by the Defendant's breach of contract. In that case the Plaintiff put on board the Defendant's barge, lime, to be transported from the Medway to London. The master unnecessarily deviated from the usual course, and during the deviation a tempest wet the lime, and the barge taking fire thereby, the whole was lost.

It was objected that the damage was not sufficiently proximate, inasmuch as the loss might have occurred by the same tempest if the barge had proceeded in her direct course. The Court held against the objection, and that the Defendant could not set up against his own wrongful act the bare possibility of a loss, if his wrongful act had not been committed. The question is not presented of how the matter would stand upon such a claim for damages, if the Plaintiff's own wrongful or negligent act had contributed to the result.

The case of Parmalee v. Wilks (22 Barb. 539), affirmed in this Court, presents a similar principle.

The Defendant there contracted to transfer a raft of logs from Port Maitland, in Canada, to Black Rock, near Buffalo, and to start at a given hour in the morning. He did not start till several hours after the time agreed upon, and by the occurrence of a storm the raft was broken up and all the logs scattered over the lake. The jury found that the accident would not have occurred if the Defendant had commenced the voyage at the time agreed upon. The Court held that the Plaintiff had the right to make the time of departure an essential part of his contract, that he had done so in the case under consideration; and it was found that the loss occurred in consequence of the Defendant's failure to comply with his contract in that respect, and that he must respond in damages.

Like the case last cited, it was a question of proximateness or remoteness of damage simply.

These cases are authorities to show, if no question of his own negligence or that of his servants had intervened, that the loss of the headings and the staves from the Caloric was sufficiently proximate, and that it did not lie in the Defendants' mouth to say that

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perhaps the same loss would have occurred if the boat had been placed where the Defendants had agreed to place her.

I think the principle of contributory negligence is applicable here, and that the Plaintiff cannot recover from this finding of facts.

The judgment upon the report of the referee, and the judgment of the General Term, should be reversed, and judgment ordered for the Defendants, with costs.

GROVER, J.—The findings of the referee must be assumed as the facts of the case. Such findings cannot be reviewed in this Court upon the weight of evidence.

It must therefore be assumed that the Defendant agreed with the Plaintiff to tow his boat from Albany to New York, placed between two deck boats in the tow; that instead of so placing the boat, he put it upon the outside of the tow, on the west side; that the boat was somewhat careened when placed in the tow, and on its passage careened still more, so as to take in water over the side, causing the boat to sink to such an extent that a portion of the cargo, consisting of staves and headings, washed off from the boat and was lost. That if the boat had been placed in the tow as agreed, such loss would not have happened, notwithstanding the negligence of the crew of the Plaintiff's boat. That there was a master and crew on board the Plaintiff's boat during the passage; that they did not exercise proper care of the boat in the situation in which she was in fact placed.

The particulars showing want of care are not expressly found, but are perfectly obvious from the finding. First, in not preventing the careening of the boat, by shifting a portion of the cargo upon the boat to the opposite side. Second, in not giving notice of the situation of the boat to the steamer having it in tow. The referee does not expressly find that the loss would not have happened in the situation in which the boat was placed had proper care been exercised by the captain and crew, but that such was his conclusion appears from his findings of fact, taken in connection with the legal conclusion found, that a want of skill or care

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on the part of the crew, which would not have resulted in a loss to the Plaintiff if the Defendant had towed his boat in the manner agreed, does not exempt the Defendants from the obligations of the contract.

This legal conclusion, and the finding of want of care in the master of the boat and crew, are wholly superfluous upon any other hypothesis.

The question comes to this—whether the Defendant, having agreed to tow the Plaintiff's boat in a particular position, where loss would not have occurred, and in violation of his agreement places the boat in a different position, where a loss does occur, but which would not but for the negligence of the master and crew in charge of the boat, is liable for such loss?

The Defendant was not a common carrier, or liable as such (Wells *v.* Steam Nav. Co., 2 Coms. 204).

He is liable for a breach of his contract, but only for such damages as the opposite party, by reasonable care and diligence, could not guard against (Miller *v.* Mariner's Church, 7 Greenleaf, 51). Indeed the principle may be regarded as elementary, and founded not only in reasons of public policy, but common honesty.

It follows that the Defendant is not liable for the damages recovered in this action.

Cases upon contracts of insurance have no analogy to the present case.

The judgment appealed from must be reversed, and a new trial ordered.

All concur.

Reversed.

JOEL TIFFANY,
State Reporter.

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THE PEOPLE EX REL. WM. B. STEPHENS, SUPERVISOR OF THE TOWN OF FREMONT, RESPONDENT, v. PETER HALSEY, TREASURER OF STEUBEN COUNTY, APPELLANT.

Board of Assessors—County Treasurer—Judicial and Ministerial Officers—Assessment Rolls—Mandamus—Relator.

The duty of assessors in determining the amount to be entered upon the tax roll is a *judicial one.* The duty of the County Treasurer to issue his warrant for the collection of such tax is *ministerial.*

The determination of the assessors is conclusive until set aside by a proceeding legally instituted for such purpose, and it is not within the authority of the County Treasurer to disregard such determination and refuse to issue the proper warrant for the collection of the tax.

The writ of mandamus may in a proper case issue against the County Treasurer, requiring him to issue his warrant, &c., on the relation of a private citizen who has an interest in having such tax collected.

THIS is an appeal from an order entered at the General Term of the Supreme Court, in the Seventh District, on the 28th of May, 1867, affirming an order of the Special Term, directing a mandamus to issue to compel the Treasurer of Steuben county to issue his warrant for the collection of a certain tax.

A certain B. F. Young, agent in the county of Steuben for William, Earl of Craven, Alexander Oswald, and Edmund B. Estcourt, non-residents of the State, made out and delivered to the Defendant, as County Treasurer, a sworn statement of the debts due to them, in twenty-five different towns in Steuben county, as required by section 2 of the laws of 1851 (p. 722). This statement purported to be "the true account of all debts owing" to said Craven, Oswald and Estcourt, "which are liable to taxation under said act."

In that statement the amount of debts due from persons in the town of Fremont was stated at $6,505.

This statement was delivered by the Treasurer to the assessors of the said town, and they, within the time in which they were required by law to complete their assessment-roll for the year 1865, entered on said roll the names of the said non-residents, and the sum of $50,000 as being the aggregate amount due them in the

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town of Fremont. In regard to this valuation of the indebtedness, the affidavit of Daniel Brownell, one of the assessors of the town of Fremont, states that the amount so entered on said roll was the amount of debts owing to these non-residents, according to the best information which the assessors could obtain; that such information was derived partly from the personal inquiries of the deponent, and that the assessors, in making said assessment, designed to enter on the roll such an aggregate amount (although somewhat less than the actual amount), as would be a fair valuation, compared with the assessment of other personal and real property liable to assessment in said town.

The tax upon this assessment of $50,000, amounting to the sum of $2,126.98, not having been paid, the County Treasurer declined to issue his warrant for its collection, upon the ground, as stated by him in his affidavit, that "it appeared that said tax was levied on an assessment of $50,000, instead of upon $6,505, which was the amount returned by the agent to deponent, and by deponent to said assessors."

An application was accordingly made to the Supreme Court, by William B. Stephens, the Supervisor of the town of Fremont, that a writ of mandamus issue directed to Peter Halsey, the said Treasurer, commanding him to issue his warrant to the Sheriff of Steuben county, or any county of this State where any debtor of such non-residents resides, commanding him to make of the goods and chattels and real estate of such non-residents the amount of such taxes required by law.

This application was granted by the Special Term, by an order entered July 28th, 1866, which order was affirmed by the General Term, from which decision the appeal is taken to this Court.

Hakes & Stevens for Respondent.

George S. Jones for Appellant.

FULLERTON, J.—The statement furnished by the agent Young, in compliance with the "act to subject certain debts owing to non-residents to taxation" (Laws of 1851, chap. 371, p. 721), was not conclusive on the assessors, and it was their right, and, if they

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suspected its accuracy, their duty, to go beyond it, and ascertain by means of other agencies the amount of the debts subject to taxation, under the provisions of the law referred to.

By that act the agent was required to return "all debts *owing* by inhabitants to persons not residing within the United States."

Instead of this, however, the statement furnished purported to be "a true account of all debts owing, which are *liable to taxation* under said act." This was a palpable evasion of the statute. It was not for the agent to constitute himself the judge of what debts were liable to taxation, and, in so doing, he made it necessary for the assessors to seek elsewhere for the information he had withheld. Whether the amount which they taxed was in excess of the amount actually due, is a question not before the Court.

In determining that amount, the assessors acted judicially (Van-Rensselaer *v.* Witbeck, 7 Barb. 133; same *v.* Cottrell, ib. 129; Bloom *v.* Burdick, 1 Hill, 130); and their assessment was conclusive, until set aside by a proceeding instituted for that purpose. At all events it was not in the power of the County Treasurer to question its accuracy or legality, when called upon to issue his warrant for its collection. His duty was purely ministerial in its character, and could not be mistaken.

His disregard of the judicial determination of a body constituted for that purpose, and his attempt to substitute for it his own unauthorized judgment, are highly reprehensible, and should not pass without rebuke. Such conduct is subversive of good order, and detrimental to the public interests. The writ of mandamus may, in a proper case, and in the absence of an adequate remedy by *action*, issue on the relation of a private individual, to redress a wrong personal to himself, or on the relation of one who, in common with all other citizens, is interested in having some act done, of a general public nature, devolving as a duty upon a public officer or body who refuse to perform it.

The collection of a tax legally assessed, in which all the inhabitants of any political division of the State have a common interest, is an instance of this character, and such collection may be enforced by any one of such citizens. It follows, therefore, that

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Stephens, being a citizen and tax-payer of the county of Steuben, was properly made a debtor in this case. This rule was adopted in the case of the People v. Collins (19 Wend. 56)—a well-considered case—and has since been frequently followed.

(The People v. Board of Supervisors, 18 How. Pr. R. 463; same v. Tracy, 1 id. 186; same v. Supervisors of Niagara County, 4 Hill, 20; same v. Supervisors of Chenango County, 8 N. Y. 317.)

Prior to the case of The People v. Collins (supra), there was no settled practice in this State on this subject; and the rule there adopted, though differing from that which prevails in many of the other States, seems to be a reasonable one, and in many instances actually necessary to obtain speedy redress for wrongs affecting the public interests.

It might with propriety be said in this case that the county, as the trustee of the people, and as such trustee entitled to the money in question, was the sufferer; and that, inasmuch as by statute, "all acts and proceedings by or against a county, in its corporate capacity, shall be in the name of the Board of Supervisors of such county" (1 R. S. 846, § 3), that, therefore, that body should have been the Relator in a proceeding by mandamus to compel the collection of the taxes assessed for its benefit. That the county, through its Supervisors, might have properly acted in that capacity, is not denied; yet, to adopt the rule that no citizen could so act, would be imposing an unnecessary burden on the county, and involve unnecessary delay in redressing its wrongs. To convene so large a body as a Board of Supervisors, for extraordinary purposes, would be attended with great inconvenience to individual officers, and entail a large expense upon the people. Inasmuch as the people themselves are the Plaintiffs in a proceeding by mandamus, it is not of vital importance who the Relator should be, so long as he does not officially intermeddle in a matter with which he has no concern.

The office which a Relator performs is merely the instituting a proceeding in the name of the people, and for the general benefit. The rule, therefore, as it is sometimes stated, that a Relator, in a writ of mandamus, must show an individual right to the thing

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asked for, must be taken to apply to cases where an individual interest is alone involved, and not to cases where the interest is common to the whole community. This is the rule adopted in many of the States (Hamilton *v.* The State, 3 Ind. 452; S. C. 10 id. 8; State *v.* County Judge, 7 Iowa, 186; State *v.* Bailey, ib. 390; Comrs. of Pike County *v.* State, 11 Ill. 202). The rule is different in other States (Heffner *v.* The Commonwealth, 28 Penn. State Rep. 108; The People *v.* the Regents of the University, 4 Mich. 98; The People *v.* The Inspectors of State Prisons, ib. 187; Arberry *v.* Beavers, 6 Texas, 457; Sanger *v.* Commissioners of Kennebec, 25 Maine, 291). But the practice which has so long prevailed here, though never, so far as I can discover, passed upon directly by the Court of last resort, where the objection was raised, seems to be a reasonable and convenient one, and ought now to be considered as settled.

This in no way conflicts with the decision of this Court in the case of Doolittle *v.* The Supervisors of Broome County (18 N. Y. 155), where it was held that an *action* could not be maintained by a person having no interest other than that which was common to all the freeholders of a town, to have the act of a Board of Supervisors, in erecting a new town, declared void.

That case was properly so decided. The difference between a case where an individual acts as Relator, or representative of the people, to redress a public wrong by mandamus, and one where it is sought to accomplish the same result by an individual, in an action brought in his own name, is strikingly apparent.

The order should be affirmed, with costs.

The Court were unanimous in approving the order, but they did not pass upon the question whether the statement furnished by the agent to the assessors was conclusive as to the amount to be taxed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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CHARLES PITT AND WILLIAM PITT, APPELLANTS, v. ERASTUS DAVISON, IMPLEADED, &c., RESPONDENT.

Specific Performance—Judgment—Contempt—Order to show cause—Service.

In an action to compel a specific performance of an agreement, when an order has been made requiring the party, at a certain time and place, to make out the necessary conveyance, &c., and the party has failed to comply with such order, a further order to such party, to appear and show cause why he should not be proceeded against as for a contempt, is a proceeding in such action; and service of such order is well made upon the attorney of such party in such actions.

There is a distinction between proceedings against a party for a criminal contempt, and proceedings as for a contempt for the purpose of enforcing any civil right or remedy.

PARKER, J.—This is an appeal from an order of the General Term of the Supreme Court, reversing an order of the Special Term, which denied Defendant's motion to set aside a previous Special Term order adjudging the Defendant guilty of a contempt of Court, and committing him therefor.

The action was for the specific performance of a contract, by which Joseph Davison agreed to convey certain premises to the Plaintiffs. Judgment was rendered adjudging the Plaintiffs entitled to a specific performance of the contract, and directing this Defendant (to whom Joseph Davison had fraudulently, as against the Plaintiffs, conveyed the premises) to convey them to the Plaintiffs free from any incumbrance which he had put upon them.

A certified copy of the judgment was served upon the Defendant personally, and he was required to appear before the referee named in the judgment, at a specified time and place, and make the conveyance under his direction.

The Defendant did not appear before the referee, but, at the time and place specified, his counsel appeared and offered to read an affidavit of the Defendant in excuse of his non-compliance with that part of the judgment which required him to convey, showing that, subsequently to the contract of sale to the Plaintiffs, but

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prior to the commencement of this suit, he mortgaged the premises for $5000, which mortgage, prior to the said judgment, was foreclosed, and the premises sold; for which reason the Defendant was unable to convey the premises to the Plaintiffs. The referee refused to receive the affidavit as an excuse, and demanded a compliance with the judgment, which was refused. He then made his report to the Court, showing the non-compliance of the Defendant with the requirements of the judgment, and the reasons therefor, set forth in said affidavit. Afterwards the Plaintiffs obtained from a Justice of the Court, at Chambers, an order requiring the Defendant to *show cause*, at a Special Term, "why an attachment should not be issued against him, and he be punished" for his alleged contempt and misconduct in not having conveyed, &c. This order was founded upon the judgment entered in the action, the summons and underwriting of the referee requiring the Defendant to appear before him and convey, the affidavit of service thereof, with a certified copy of the judgment, and the report of the referee; and it contained a direction that it be served on the Defendant's attorney. It was so served, but no service was made on the Defendant personally. At the Special Term at which the order was returnable, upon reading the judgment roll in the action, together with the said papers on which the order to show cause was granted, and the order to show cause, with the admission of service of the same upon the Defendant's attorney, and after hearing counsel for the respective parties, the Court adjudged the Defendant guilty of a contempt of Court, in wilfully neglecting and refusing to comply with the terms and provisions of the judgment, and ordered that he be committed to the common jail of the city and county of New York, and there be closely confined and kept until he should comply with the requirements of the judgment. The Defendant was subsequently arrested upon a precept issued pursuant to the order, and committed to jail.

He then made a motion to set aside the order under which he was committed, and to be discharged from imprisonment; which motion was founded upon the papers on which that order was

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based, together with affidavits showing that he had no present knowledge of the order to show cause above mentioned, until after the granting of the order directing his imprisonment. In opposition to the motion, affidavits were read on the part of the Plaintiffs, showing that, after the referee had reported, and some nine months before the granting of the said order to show cause, a similar order to show cause had been made without any direction as to its service, and that after diligent search the Plaintiffs were unable to make personal service thereof; also controverting the fact stated in Defendant's affidavit, of his want of knowledge of the last order to show cause.

This motion was denied at the Special Term. The General Term, on appeal, reversed the order denying the motion, and discharged the Defendant from imprisonment. It is from the order of the General Term, thus made, that this appeal is taken.

Was there any such irregularity or defect in the granting of the order under which the Defendant was arrested and imprisoned, as to require that it be set aside?

By the 1st section of title 13, chap. 8, part 3 of the Revised Statutes, entitled, "Of proceedings, as for contempts, to enforce civil remedies, and to protect the rights of parties in civil actions" (2 Rev. Stat. 534, 1st ed.), provision is made that every Court of Record shall have power to punish, by fine and imprisonment, or either, parties to suits, and others *for any disobedience to any lawful order*, decree, or process of such Court, whereby the rights or remedies of a party in a cause or matter depending in such Court may be defeated, impaired, impeded or prejudiced. And by section 285 of the Code, it is provided that when a judgment requires the performance of any other act than the payment of money, "a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced. If he refuse he may be punished by the Court, as for a contempt." It is plain, then, that the Defendant, upon refusing to obey the judgment, was guilty of misconduct which made him liable to be proceeded against as for contempt.

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Two methods of proceeding against a party for such misconduct are provided for by section 5 of the statute in relation to contempts, above referred to, which are as follows:

"The Court shall either grant an order on the accused party, to show cause at some reasonable time to be therein specified, why he should not be punished for the alleged misconduct, or shall issue an attachment to arrest such party, and to bring him before such Court, to answer for such misconduct."

If the proceeding by attachment is adopted, the party accused is to be arrested and brought personally before the Court, unless he gives a bond, with sureties, to appear on the return of the attachment, and abide the order and judgment of the Court thereupon (§ 12); and when he is brought into Court upon the attachment, the Court must cause interrogatories to be filed, specifying the facts and circumstances alleged against him, and requiring his answer thereto (§ 19). Under this mode of proceeding, no order for punishment for the misconduct by fine or imprisonment can be made, unless the party accused shall have been brought personally into Court, upon the attachment, or shall have voluntarily appeared therein; but in default of his being so brought in, or so appearing, the Court either awards another attachment, or orders the bond taken on his arrest to be prosecuted.

If the other mode of proceeding is adopted, there is no specific direction in the statute in regard to the manner in which the order to show cause shall be served, or as to the course of proceeding after service, except that section 3 provides that when the misconduct is not committed in the immediate view or presence of the Court, the Court shall be satisfied by due proof by affidavit of the facts charged, "and shall cause a copy of such affidavits *to be served on the party accused*, a reasonable time to enable him to make his defence."

The mode of proceeding adopted in the case at bar, was by the order to show cause, and the question is, whether *personal* service upon the Defendant, of the order to show cause, with the affidavits upon which it was granted, was necessary.

The learned Judge who gave the opinion of the General Term

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in the Court below, held that personal service in such cases is indispensable, basing his opinion on the well settled principle of the common law, that no person shall be condemned unheard.

If we keep in mind the distinction between proceedings to punish criminal contempts, and proceedings as for contempts to enforce civil remedies, we shall see the reason why personal notification of the accusation is, under the principle invoked by the learned Judge, indispensable in the one case, while it may not be in the other. Where the proceeding is to enforce a civil remedy, the party in default has already had the opportunity of contesting his liability to perform what the proceeding seeks to compel him to perform, and such proceeding is, in effect, but an execution of the judgment or order against him. There is in the nature of the proceeding, as carried out in this case, no more reason for denouncing it as an infraction of the principle that no person shall be condemned unheard, than in every other case where an execution may issue upon a judgment against the person of the Defendant. Judgment in an action for tort, for example, is obtained against a Defendant, whereby he is condemned to pay the Plaintiff a specific sum of money. In order to compel him to pay the money he is liable to arrest and imprisonment, and this without any opportunity to show cause against it. It is the consequence of his non-payment of the money, which, after personal notice and the opportunity to contest the claim, he has been adjudged to pay. He, therefore, is not condemned unheard. The execution against his person is in pursuance of the judgment which has been rendered against him by the Court, after personal notice of the claim, and full opportunity to be heard against it.

In reference to the right to be heard, the Defendant, in the case at bar, occupies a similar position. His obligation specifically to perform the contract in question in the action, has been established by the judgment, in regard to which he has been heard; and this proceeding is merely to enforce his fulfilment of that obligation. He can no more impugn the proceeding upon the ground of its contravention of the great principle alluded to, than

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if he were Defendant in an execution against his person in an action for tort.

As has already been observed, the statute under which this proceeding was instituted, does not specify *in what way* the order to show cause, with the affidavits on which it was founded, shall be served upon the party accused. When the proceeding is instituted by one party to an action against another, to enforce the performance of an order or decree, it is to be deemed, I think, a proceeding in the action, and all the papers are entitled in the action (Stafford *v.* Brown, 4 Paige, 360; Brown *v.* Andrews, 1 Barb. S. C. Rep. 227). Hence it was, doubtless, that the Chancellor, in Albany City Bank *v.* Schermerhorn (9 Paige, 372), said: "Where the party proceeds by an order to show cause, copies of the order, and of the affidavits and other papers on which it is founded, must be served on the accused, or his solicitor," &c. In Watson *v.* Fitzsimmons (5 Duer. 629), the Plaintiff obtained an order to show cause why the Defendant should not be punished for his misconduct in refusing to deliver his property to a receiver. Upon the return of the order, the Defendant appeared and denied the alleged contempt, and the Court made a further order, referring it to a referee to take testimony and report whether the Defendant was guilty of a contempt. The referee reported the Defendant guilty, and upon his report, and all the prior proceedings, the Plaintiff moved the Court for an order adjudging the Defendant guilty of the contempt. On the part of the Defendant it was insisted that the Court had no power to make the order of reference. The Court, however, said: "This proceeding is one had in the action in which the judgment was recovered, and § 271, sub. 3 [of the Code], authorizes a reference in such a case." And after adverting to the two modes of procedure, by order to show cause, and by attachment, the Court further said: "The statute is silent, when the mode first named is adopted, as to the course to be thereafter pursued, whether the Defendant appears or fails to appear. It may, therefore, be such as conforms to the general practice of the Court, upon any order to show cause why relief should not be granted." The proceed-

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ing was held regular, and the decision was affirmed by the General Term, and, as appears by a statement in 10 Bosw. R. 697, was subsequently affirmed in this Court.

In the case at bar it is correct, I think, to say that the proceeding was one taken in the action. The judgment remained unexecuted, and the Court was proceeding in the mode prescribed by the statute, to execute its judgment. The order to show cause provided for by the statute, in the absence of any statutory provision to the contrary, was, then, governed by the practice of the Court in regard to orders to show cause, both in respect to its service and the further proceedings upon it. That according to such practice, an order to show cause may be served upon the attorney of the party, will not be denied. Indeed, that is the mode of service of all papers in the action, prescribed by the Code, except the summons, or other process, or any paper to bring a party into contempt (Code, §§ 417, 418). The papers in this case, which brought the party into contempt, were the certified copy of the judgment and the summons, and the underwriting of the referee, requiring the Defendant to appear before him and make the conveyance. These were personally served, and the Defendant, by his refusal to comply with them, was brought into contempt.

The learned Judge who gave the opinion in the Court below has referred, in support of his position—that personal service of the order is indispensable to the provision of the statute on the subject of criminal contempt—to 2 R. S. 278, § 12 (1st ed.), requiring personal service, as follows: "Contempts committed in the immediate view and presence of the Court may be punished summarily; in other cases, the party charged *shall be notified of the accusation*, and have a reasonable time to make his defence." But the succeeding 14th section is as follows: "Nothing contained in the preceding sections shall be construed to extend to any proceeding against parties or officers, as for a contempt, for the purpose of enforcing any civil right or remedy."

The order to show cause is, in effect, but a notice of motion, and according to the practice of the Court may ordinarily be served on the attorney of the adverse party. Although in this case the

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judgment was entered in May, 1856, and the order to show cause was made and served on the Defendant's attorney on the 9th of December, 1857, yet, inasmuch as it appears that the Defendant had avoided the service of a prior order to show cause, and that after service of the second order, by the direction of the Court, upon the attorney, and before the granting of the order on which the Defendant was arrested and imprisoned, he consulted his said attorney, and has not denied that the attorney was authorized to appear for him, and oppose the granting of the order for his arrest and imprisonment, and as he did appear, it must be clear that the attorney is to be regarded as the Defendant's attorney, when the service was made, and that the service of the order to show cause was in all respects sufficient (Drury *v.* Russell, 27 How. P. R. 130).

Another ground stated in the opinion of the Court below for the reversal of the order of the Special Term was, that in the order to show cause the Defendant was required to show cause "why an attachment should not be issued against him, and he be punished for his alleged contempt and misconduct in not having conveyed," &c., while the statute does not authorize an order to show cause why an attachment should not issue, but only "why he should not be punished for the alleged misconduct." If the order required of the Defendant more than the statute allowed, that would not make it void, as to the requirements which the statute does allow; and the suggestion that it *might have misled* the Defendant to suppose that only an attachment would be applied for, and that he would have an opportunity, when brought into Court upon the attachment, to answer the accusation made against him upon interrogatories, is one which, I think, is insufficient to justify a reversal of the order of the Special Term, since there is no pretence by the Defendant that he was so misled.

As another ground for its order of reversal, the General Term is inclined to the opinion that, even in this case, it was necessary to file interrogatories, and that the order of commitment was not warranted until the Defendant had been given the opportunity, upon interrogatories, to purge his contempt. The statutes cited, and what has already been said in regard to them, show, I think,

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that when the proceeding is by an order to show cause, no interrogatories are necessary. And such was the opinion of this Court in Brush v. Lee (decided June Term, 1867).

A further ground for the decision of the General Term, put forth in the opinion, is, that inasmuch as the Defendant was never personally before the Court in this matter, the Court had no jurisdiction of his person, and, therefore, the order for his arrest and imprisonment was unauthorized and void.

If the proceeding is to be regarded as one in the action, as I have endeavored to show it is, then clearly this ground is not well taken. The Court having obtained jurisdiction of the person of the Defendant, in the action, retains that jurisdiction for all purposes of enforcing the judgment, until its requirements are fully performed and executed.

It is obvious, also, that the excuse for non-performance of the requirements of the judgment, could not be regarded by the Court as an excuse, for that would be permitting the party to set up as such excuse what he should have set up against the rendering of the judgment. After judgment has passed against him, no matter which would have constituted a defence to the judgment, and, if in due time and manner brought before the Court, prevented it, can be allowed as a reason why it should not be enforced.

I am of the opinion that the order of the General Term, reversing the order of the Special Term, is erroneous, and should be reversed.

Reversed.

PORTER and BOCKES, JJ., dissenting.

JOEL TIFFANY,
State Reporter.

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MALINDA J. McCLURE, RESPONDENT, v. BOARD OF SUPERVISORS OF NIAGARA COUNTY, APPELLANTS.

Practice—Adjustment of Costs—Non-appealable Order—Judgments against Municipal Corporations—Statute in relation to Costs.

An appeal does not lie to this court from an order of the Supreme Court adjudicating costs.

The law of 1859 (ch. 262, § 2), providing that no costs, fees, disbursements, or allowance shall be recovered or inserted in any judgment against municipal corporations, unless the claim upon which such judgment is founded shall have been presented for payment to the chief fiscal officer of such corporation before the commencement of an action thereon, does not apply to a cause of action arising ex delicto.

G. D. Lamont for Appellants.

P. L. Ely for Respondent.

DAVIES, CH. J.—In the Supreme Court the Plaintiff recovered judgment against the Defendants, and the costs were adjusted by the clerk at the sum of $206.77.

The Defendants appealed therefrom to the Special Term, where such allowance and adjustment were affirmed, and that order was affirmed at the General Term. From this order the Defendants appeal to this Court.

The Defendants claim that the Plaintiff is not entitled to costs, by reason of the provisions of the second section of chapter 262 of the Laws of 1859. That section declares, that "no costs, fees, disbursements, or allowance shall be recovered or inserted in any judgment against municipal corporations, unless the claim upon which such judgment is founded, shall have been presented for payment to the chief fiscal officer of such corporation, before the commencement of an action thereon."

The suit is brought for damages sustained by the Plaintiff for the destruction of her property by a mob or riot, and to enforce the liability of the county therefor, under the 428th chapter of the Laws of 1855.

The claim upon which the action was founded was not presented for payment to the County Treasurer of Niagara county, nor

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to any officer of the county, nor to the Board of Supervisors of said county, before the commencement of the action thereon.

The order is clearly not appealable to this Court. It is not a final order affecting a substantial right in an action after the judgment. It is part of the judgment itself; and if appealable at all, is reviewable by this Court only upon an appeal from the judgment.

It is not an order which in effect determines the action and prevents a judgment. The case of Clarke *v.* The City of Rochester (34 N. Y. 355) is quite decisive of this view, and the appeal should therefore be dismissed, with costs. I think that upon the merits the order should be affirmed. The provision in the act of 1859 was clearly intended to protect municipal corporations from the payment of costs for demands which in their nature were capable of audit, and which the authorities were authorized to pay on presentation and adjustment.

The intent of the statute is plain. It could never have contemplated that claims sounding in damages, the amount of which could only be ascertained by an investigation and the examination of witnesses, should have been presented for payment, before suit brought.

Two questions would always immediately arise: 1, The corporate liability; and 2, The amount of damages. A claim of the character like that in controversy in this action is not within the meaning and intent of the second section of the act of 1859. Such were the views of this Court in the case of Howell *v.* The City of Buffalo (15 N. Y. 512). The charter of that city contained a similar provision to that found in the second section of the act of 1859. The Plaintiff sued the corporation of Buffalo for taking and conveying away and converting to its own use certain bank notes, of the value of $355, the property of the Plaintiff.

The provision in the charter was: "It shall be a sufficient bar and answer to any action or proceeding in any Court, for the collection of any demand or claim, that it has never been presented to the council for audit or allowance." It appeared that the demand or claim of the Plaintiff had never been presented to the

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council for audit and allowance, and the corporation claimed that consequently the Plaintiff was not entitled to recover.

The Court held that claims arising ex delicto were not required, by this section of the charter, to be submitted for examination and audit to the Common Council before action brought.

We are cited to a decision of the General Term of the Second District (36 Barb. 226), holding a contrary doctrine. That Court was of the opinion that the provisions of the 2d section of the act of 1859 were applicable to claims for damages on account of the negligence or misconduct of the city authorities, as well as to demands upon contract.

This learned Court does not seem to have had its attention called to the case of Howell *v.* The City of Buffalo (supra). If it had, we are to assume its decision would have been conformed to it.

We cannot regard this case as an authority for departing from the principle enunciated by this Court in Howell *v.* City of Buffalo; and if we were called upon to pass upon the merits of the order appealed from, we should have no hesitation in standing by the doctrine there laid down, and holding that this second section of the act of 1859 does not apply to a claim of the character presented in this action.

The appeal should be dismissed, with costs.

All concur.

Dismissed.

JOEL TIFFANY,
State Reporter.

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JOB BROOKFIELD v. GEORGE REMSEN.

Execution—Sheriff's Liability for Non-return.

A Sheriff neglecting to return an execution within the time required by law is prima facie liable for the amount called for on the execution. If he would avoid such liability in any degree he must show that the Defendant in execution had not sufficient personal property whereon to levy the same, or some evidence in mitigation of damage. Failing to do so, it is not error for the Judge to direct a verdict against him.

A. P. Whitehead for Respondent.
N. F. Waring for Appellant.

GROVER, J.—A Sheriff neglecting to return an execution within the time required by law, is liable to the owner, prima facie, for the amount (3d Selden, 550). It may be shown on the part of the Sheriff, in mitigation of such liability, that the Defendant had not sufficient personal property out of which the whole, or any part of the execution, could be collected. In the present case, it was shown that the execution was not returned within the sixty days required by law. Hence it appeared that the Sheriff was liable.

Showing that the execution was returned a few days thereafter did not discharge such liability, or in any way affect it. The Defendant made no request to the Court, to submit any question in regard to the Defendant's personal property to the jury, nor was there any direct evidence that the execution could not have been collected out of such property in its life. The Judge did not err in directing a verdict for the Plaintiff for its amount. No ground for objecting to the introduction in evidence of the clerk's certificate was stated. Thus the exception raises no question for consideration in this Court.

The judgment appealed from must be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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MOSES TAYLOR AND OTHERS, APPELLANTS, v. THE ATLANTIC MUTUAL INSURANCE COMPANY, RESPONDENTS.

Wharfage—Abandonment of Wrecked Vessel to Insurers—Liability—Damages for Obstructing Wharves and Piers.

When a vessel, lying at a wharf in the city of New York, takes fire and sinks to the bottom, and is then and there abandoned to the insurers, who accept the abandonment, they do not thereby incur any responsibility for the obstruction occasioned by the sinking of such vessel, nor are they under any obligation to the public to remove the same.

No action can be maintained by a lessee of the corporation entitled to wharfage or shippage against the underwriters for damages occasioned by such obstruction by the sinking of the vessel.

Charles Tracy for Appellants.

D. Lord for Respondent.

DAVIES, CH. J.—This action was prosecuted to recover from the Defendants certain moneys claimed to be due from them to the Plaintiffs, as wharfage or shippage, in respect to a certain ship called the Joseph Walker; or the damages which the Plaintiffs claimed they had sustained by the loss of such wharfage or shippage, by reason of the wrongful and negligent acts of the Defendants, and their agents and employees.

The ship Joseph Walker, of about 1300 tons burthen, while lying on the west side of the pier No. 29, East River, at the port of New York, taking in cargo, took fire on the 26th of December, 1853, and sank to the bottom of the river, in about thirty feet of water.

She had on board about 300 or 400 barrels of resin, about 300 bales of cotton, and about 20,000 bushels of wheat, all of which were submerged.

The Defendants, The Atlantic Mutual Insurance Company, were insurers of $\frac{13}{32}$ parts of the ship.

Other insurance companies who are also parties Defendants,

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were insurers of the interest of other owners, only $\frac{6}{32}$ parts being uninsured; and the owners of those parts are also Defendants.

The sunken wreck was not removed from the slip until the 25th or 26th of October, 1855.

The insured owners of the vessel abandoned her, after she was burned and sunk, as a total loss, and the insurance companies accepted the abandonment.

The Plaintiff, Moses Taylor, as lessee of the corporation of New York, was entitled to demand and receive the wharfage of the bulkhead on the easterly half of the slip, and to the wharfage or shippage arising from the westerly half of the pier.

When the case was first before the Superior Court of New York, for consideration upon a demurrer to the complaint, that Court held that the Plaintiffs could not recover without showing that the Defendants, by due care and attention, could have removed the wreck, or at least have shifted its position, so as to prevent its being a cause of injury; and by showing that they were in default for not doing so.

That Court also held that the Defendants, having insured an undivided interest in the ship, and having accepted an abandonment, made by such insured owners, after the vessel was so burned and sunk, were not liable for loss of shippage or wharfage caused by such obstruction, it not being alleged that by due care and attention it could have been removed.

And also held that such piers and bulkheads are open to the common use of the public for any purposes connected with the loading, unloading, or repairing of vessels, and securing their cargoes, whether in vessels afloat or sunk, not prohibited by statute or the lawful ordinances of the Common Council; and that such use, when it neither encumbers the bulkhead or pier, so as to incommode the loading or unloading of vessels, or the passing or repassing of carts, nor in any way injures the structure itself, gives no right of action to the party entitled to shippage or wharfage.

Held also, that a use of a slip, in attempting to raise a vessel, and recover the property in it, especially as such attempt was made at the request of the Plaintiffs, created no liability to make com-

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pensation for such use, as no facts were stated showing such use to be wrongful, or an invasion of the Plaintiffs' right, or a violation of any duty which the Defendants owed to them.

The demurrer to the complaint was sustained, and judgment given for the Defendants, with leave to Plaintiffs to amend (2 Bos. Rep. 106).

The complaint was amended, and as thus amended did allege: "That the said wreck (ship Joseph Walker) could have been removed with reasonable care, skill, and diligence in a short space of time; to wit: in the space of sixty days from the time when so sunk."

"That the Defendants, having control and possession of the said ship, have conducted themselves so negligently, unskilfully, and carelessly in and about their attempts at the removal of said ship, which they undertook to do, and as was their duty to do; and in and about the bringing into said slip and sinking, or suffering to be sunk and left there, the said other vessels or hulks, and in various other acts of negligence, unskilfulness, and carelessness in respect thereto, that the Plaintiffs have suffered great and lasting injury."

That "by means of all which premises, and by the said several acts of negligence and unskilfulness, and by said other obstructions, brought into said slip by the Defendants, and left there, and by injury to the said wharf and pier as aforesaid, and by the said piles driven and left remaining in said slip, as aforesaid, and by said obstructions to the passing and repassing of carts upon and over said pier and wharf, as aforesaid, and by preventing the entering and loading and unloading of vessels into and alongside of said slip, pier, and wharf, and by their unnecessary use and occupation of said premises as aforesaid, the said pier, wharf, slip or basin has been greatly interfered with, and the Plaintiffs greatly damaged."

On the second trial, upon this amended complaint, the Plaintiffs adduced their testimony, and rested.

And it was admitted that the fire in the Joseph Walker was accidental; that it did not originate on board, and that the proprietors were not in fault in regard to the fire.

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The counsel for the Defendants asked the Court to charge the jury to find a verdict for the Defendants, on the ground:

1. That the wharfage was proved to have been paid by the owners up to December 27, 1853, when the vessel was sunk, and the obligation to pay wharfage after that ceased. When she ceased to be a floating ship, without the fault of the proprietor, by an accident which, as to the owner, was a destruction of his property, that common loss and calamity were so far shared by the pier owners.

2. That in no view that could be taken of an express or implied contract, was there any ground for implying a contract to pay wharfage by the abandonees of a ship sunk to the bottom, and which could not be removed by any of the ordinary appliances belonging to a ship.

3. As to the idea of obstructing wharfage, it was decided in this case that, under the circumstances of this very accident, no wharfage could be claimed for the materials that were necessary for relieving the pier and slip from the obstructions that had sunk there.

4. That the vessel being sunk in a public water, it was the duty of the Plaintiffs, or of the city authorities, to remove the obstruction. The city made the Plaintiffs grantees of the tolls, and it was the duty of the Plaintiffs to remove the obstructions, in consideration of being entitled to such tolls; and they could make no claim upon any one for the continuance of that obstruction, which it was their duty, as receivers of the wharfage and tolls, to remove.

5. It was the duty of those having the tolls to clear the obstruction, and then, if any one was in fault, to throw the expenses upon those in fault.

6. The insurers by abandonment do not acquire an actual movable possession; they are not the parties in actual possession, and are not chargeable with the removal of the ship; they were merely owners of what should be saved.

7. Further, if there was an obligation on the owners to remove the vessel, there could be no other obligation than to use reasonable diligence for such removal; and the Defendants could not be

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liable, inasmuch as the evidence was undisputed that they had used due diligence.

8. The sunken ship was an obstruction in a public water, without any fault of the Defendants, or original liability against them; and the engagement of salvors, by contractors having possession and conducting the work, did not render them servants of the insurers, or the insurers responsible for their acts.

The counsel for the Plaintiffs contended that the Defendants had accepted the abandonment, and considered the wreck of value, and made a contract looking to recover something from the proceeds. That by this act of theirs, and the transfer to them, they became owners.

That the wreck was regarded as removable, and the Defendants, if they chose to bring vessels and the like there in getting her out, should pay wharfage.

The Court charged the jury, that upon the evidence adduced by the Plaintiffs, as matter of law, the Defendants were entitled to their verdict. To this direction, that the jury should find for the Defendants, the Plaintiffs' counsel demanded to go to the jury. This was denied, and the Plaintiffs excepted.

The jury then found a verdict for the Defendants, and judgment thereon was affirmed at the General Term of the Superior Court of New York, and the Plaintiffs now appeal to this Court.

It will be convenient to consider, in the first place, the ground of recovery, and the only ground upon which the Plaintiffs claimed, at the trial, they were entitled to recover, viz.: that under the circumstances detailed the Defendants were liable to pay wharfage.

The Plaintiffs claimed that they were entitled to the wharfage of the bulkhead or wharf forming the extremity or water side of South street, between piers Nos. 28 and 29, on the East River, and were also entitled to the wharfage of the westerly half of pier No. 29.

Such right could only have been acquired by leases or grants, made by The Mayor, Aldermen, and Commonalty of the city of New York, and such a lease had been so granted to Plaintiffs.

The corporation of the city of New York were originally the

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owners of the land between high and low water mark on the East River, and four hundred feet beyond low-water mark, extending into said river.

At an early day the said corporation commenced making grants of said lands to the owners or proprietors of the adjacent upland, extending the street through the same, and requiring the persons taking out such grants to fill in the intermediate spaces between said streets, and to construct and maintain the same.

By section 220 of chapter 86 of the Revised Laws of 1813, it was enacted that it should be lawful for the said the Mayor, Aldermen, and Commonalty, to lay out, according to the plan agreed upon for that purpose, regular streets or wharves, of the width of seventy feet, in front of those parts of the said city which adjoin the East River or Sound, and to the North or Hudson River, and to such extent along those rivers, respectively, as they might think proper; and they had power to lengthen and extend, from time to time, said streets or wharves. Section 221 declares that the said streets or wharves shall be made and completed according to said plan, by and at the expense of the proprietors of land adjoining or nearest and opposite to the said streets or wharves, to the breadth of their several lots; and said respective proprietors were to fill up and level at their own expense, according to such plan, the spaces lying between their said several lots, and the said streets and wharves; and should upon so filling up and levelling the same be entitled respectively to become the owners of the said intermediate spaces of ground in fee simple.

In pursuance of these provisions South street, the exterior street on the East River, was made and constructed of the width of seventy feet, by the Plaintiffs or their grantors.

The 224th section of this act authorizes the corporation to direct piers to be sunk and completed, at such distances and in such manner as it may think proper, in front of said streets or wharves so adjoining and extending along the said rivers; and the said piers to be connected with the said streets or wharves by bridges, at the expense of the said proprietors; and if they should neglect or refuse to make the same according to such directions, then it

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was made lawful for the said corporation to sink and make said piers and bridges, at its own expense, and to receive to its own use wharfage for all vessels that might at any time lie or be fastened to said piers or bridges which they might make.

Or it might be lawful for the said corporation to grant the right of making such piers and bridges, and the right of receiving the profits thereof.

The 233d, 234th, and 235th sections of said act contain prohibitions upon all persons throwing or placing any obstructions in any dock, or upon any wharf in said city, and impose penalties therefor.

And section 236 declares, that it may be lawful for the said corporation to make such by-laws and ordinances, as they should from time to time think proper, for regulating the wharves, piers, and slips in said city.

We thus see, by these provisions of the statutes, that the wharves on that side of the exterior streets of the city front and adjoin the East or North River; that the piers are projections extending from said wharves out and into said rivers; and that the spaces lying between said piers are called and known as slips.

Section 212 of this act fixes the rates of wharfage for all ships and vessels *using* the wharves in said city, to be charged and received by the owners thereof respectively; the rates therein specified to be paid "for every day such ship or vessel shall use or be made fast to any of the said wharves."

And section 215 declares that every ship or other vessel which shall make fast to any other ship or vessel that shall be fastened to any wharf, and being so fastened shall load, unload, or careen, shall pay the one-half of the rate of wharfage such ship or vessel would have been liable to pay if fastened to such wharf, and there loaded, unloaded, or careened.

And section 216 declares that the master or owner of any ship or other vessel, or, in their absence, the factor or agent to whom such ship or vessel shall be consigned, shall be liable to pay the wharfage due for such ship or vessel. Provided, however, that such factor or agent shall not be liable for the same, unless an account of the wharfage due shall be delivered to such factor or

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agent, or if absent, left at his usual place of abode, and the money there demanded, before the departure of such ship or vessel from the port.

It is, therefore, very clear, from these provisions of the statutes, that wharfage is only demandable for the *use* of the wharf or pier, and the statutes define in what that use is to consist, or rather what is the evidence of such use.

It is, that the ship or vessel should be made fast to such wharf or pier; or if made fast to any other ship or vessel which shall itself be fastened to any wharf or pier.

The statutes do not require the payment of wharfage by any ship or vessel, unless such ship or vessel is made fast to some wharf or pier, or is fastened to another ship or vessel which is already made fast to any such wharf or pier.

This construction is confirmed by the act of 1860 (chap. 254 of Laws of 1860), the first section of which act declares that it shall be lawful to charge and receive wharfage or dockage at the following rates:

"From every vessel that uses or makes fast to any pier, wharf, or bulkhead within the cities of New York or Brooklyn, for every day or part of a day's use of the same, viz.: From every vessel of two hundred tons burden or under, one cent per ton; and for every vessel over two hundred tons, one cent per ton for each of the first two hundred tons, and for every additional ton burden, one-fourth of one cent per ton; and from every vessel making fast to another vessel lying at any pier, wharf, or bulkhead, and for every vessel lying at anchor within any slip or basin, one-half of the above rates."

The Joseph Walker, after December 27, 1853, up to which time the accustomed wharfage was paid, did not, after that date, make use of the Plaintiffs' wharf or pier, or make fast to any such wharf or pier; nor was it made fast to any other vessel or ship which was fastened to such wharf or pier.

The Plaintiffs therefore had no legal claim for wharfage, in respect to said vessel, after her partial destruction by fire and sinking in thirty feet of water, on the night of December 26, 1853.

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As this was the only claim the Plaintiffs made at the conclusion of the trial, and as the statutes of the State did not authorize them to demand and receive wharfage, in respect to a ship sunk thirty feet under water, the Judge rightfully decided that the Plaintiffs were not entitled to receive such wharfage, and properly directed the jury to find a verdict for the Defendants.

We do not think the exception taken to the refusal of the Judge to the demand of the Plaintiffs' counsel to go to the jury, is available on this appeal. If such demand is to be understood to mean that the Plaintiffs demanded to go to the jury on the question as to their right to recover wharfage, then it was properly refused, as such right was, upon the conceded facts, a question of law solely, and, as it has been shown, was properly decided adverse to the Plaintiffs, by the Judge at the trial.

If, however, the Plaintiffs' counsel desired to go to the jury on other questions, it was incumbent on him to point out specifically the particular question he desired to be submitted to the jury.

This point was distinctly ruled in Winchell v. Hicks (18 N. Y. 558); and the doctrine of that case has received the frequent approval of this Court.

If the Plaintiffs had desired any questions of fact to be submitted to the jury, they should have distinctly stated them, and made their request accordingly, and, if refused, taken an exception.

There is certainly no ground of liability on the part of the Defendants to compensate the Plaintiffs for the use of a wharf or pier, in going to and coming from the wreck, or the vessels afloat on the waters of the East River, employed in raising it.

These waters are part of the arm of the sea, and are a public highway, and navigable to all.

The Plaintiffs have no right to claim compensation for their use. The act of 1860, already quoted, was the first authority given by the State, to the owners of the adjacent wharves or bulkheads and piers, to charge for any vessel lying at anchor within any slip or basin, and then only half the usual wharfage.

The Plaintiffs can claim nothing by virtue of this act, as it was

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not in force until years after the removal of the wreck of this vessel.

Equally untenable is the claim that the Plaintiffs are entitled to compensation from the Defendants for the use, by their agents and servants, in passing and repassing, of the wharf and pier of the Plaintiffs, in going to and coming from the wreck of said ship, and the vessels employed in raising her.

These wharves and piers are streets of the city of New York, for the free passage of all citizens, and are so declared by statute. The only revenues authorized to be derived therefrom are the wharfage already referred to, and the charge authorized to be made by the third section of the act of 1860 already adverted to.

This section makes it lawful for the owner or lessee of any bulkhead, pier or basin in the port of New York, to charge and receive the sum of five cents per ton on all goods, wares or merchandise remaining on the bulkhead or pier owned or leased by him, for every day after the expiration of forty-eight hours from the time such goods, &c., shall have been left or deposited on such pier or bulkhead.

Obviously, this section furnishes no ground of liability on the part of these Defendants, even if it had been in existence at the time of the happening of this accident.

It is now contended that these Defendants were in fault in respect to the sinking of the Joseph Walker.

And the main ground upon which it is now argued that they are liable to the Plaintiffs is, that they so negligently, carelessly and unskilfully managed the raising of said wreck, and the removal thereof, that the Plaintiffs sustained great damage thereby. A conclusive answer to this position is, that the Plaintiffs did not request any such question to be submitted to the jury, and to be passed upon by them.

But upon the evidence adduced on this trial, the jury would not have been warranted in finding that the Defendants had carelessly, unskilfully, or negligently managed the raising and removal of said wreck, or that they had unreasonably delayed the same.

The place where said wreck was sunk was a part of an arm of

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the sea, and embraced a portion of the navigable waters of the State.

It might be very doubtful whether the Defendants were under any obligation to remove said wreck.

The current of authority would seem to show that they were not.

Thus, in King v. Watts (2 Esp. 675) it was held, that from an unavoidable accident producing the wreck of a vessel, no duty arises to the owner to take any precautions, or to remove the impediments to the navigation which were created, and that there was no reason for throwing upon the owner any special care, in consequence of what may be considered as a misfortune both to him and to the public.

In Browne v. Mallett (5 M. G. & Scott, 613), Maule, J., in his elaborate opinion, says: "It is the duty of a person using a public navigable river with a vessel of which he is possessed, and has the control and management, to use reasonable skill and care to prevent mischief to others." And he adds: "His liability is the same, whether his vessel be in motion or stationary, floating or aground, under water or above it;" for in "all these cases," he says, "the vessel may continue to be in his possession, and under his control and management."

Baron Alderson, in his judgment in White v. Crisp (26 Eng. Law & Eq. Rep. 532), referring to these observations of Justice Maule, remarks: "This duty arises out of the possession and control of the vessel being in him, and it is clearly, also, laid down in the same judgment, that this liability may be transferred with the transfer of the possession and control, to another person; and further, that on the abandonment of such possession, control and management, the liability also ceases." He further says: "If we apply these principles to this declaration, we find a distinct averment, that up to and at the time of the injury to the Plaintiff's vessel, the Defendants, to whom the sunken ship had been transferred, exercised the possession, control, management and direction thereof. Now, we understand by this that the Defendants had it in their power, by due care and exertion, to have

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altogether removed this vessel, or to have shifted, at least, its position, and so might reasonably have been able to have prevented the injury. * * * It is clear that either the original owner or the transferee of the wreck may abandon it, and so put an end to his liability."

The head-notes to this case state accurately the principle decided: "The owner of a vessel which has been sunk in a navigable river is bound to use proper care to prevent accidents to other vessels, so long as he has the possession, control, and management of the vessel—that is, so long as by due care and exertion he can either remove the vessel, or so far shift its position as to prevent such injury. This duty attaches to the ownership for the time being, and will be transferred to a purchaser of the sunken vessel; and it makes no difference that the vessel lies in a part of the channel not ordinarily used for navigation, but the duty ceases on the abandonment of the possession of the vessel."

If these views are sound, and it is believed that they are eminently so, it is not perceived that in any aspect in which the facts developed on this trial are regarded, can these Defendants be held to any liability to these Plaintiffs, in respect to any of the matters set forth in the complaint in this action.

The judgment of the Superior Court of New York was correct, and should be affirmed, with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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GARRIT S. MOTT, APPELLANT, v. THE UNION BANK OF THE CITY OF NEW YORK, RESPONDENT.

Provisional Remedies—Arrest—Judgment defined.

An order of arrest in a proper case may be made during the progress of a trial, and before a final judgment settling the rights of the parties thereto. But a judgment so modified as that an execution cannot be issued to enforce it, until after further adjudication, is not such a judgment as will prevent the making the order of arrest as one of the provisional remedies which may be necessary for the security of the Plaintiff.

Where a judgment had been entered on the default of one of the Defendants, and such Defendant subsequently appeared by attorney and procured an order for him to serve Plaintiffs with an answer within ten days, and the judgment by default to stand as security, held, that the judgment so modified was not such a judgment as to prevent the granting of an order for the arrest of Defendant pending the trial upon the issue raised by his answer.

PARKER, J.—This action was brought in the Superior Court of the city of New York, for an alleged false imprisonment of the Plaintiff. The Defendant justified under an order of arrest made on the 8th day of December, 1858, by a Justice of the Supreme Court, in an action commenced in that Court by this Defendant against this Plaintiff and Jacob H. Mott, for fraud.

An order of arrest was obtained at the commencement of that action, under which Jacob H. Mott was arrested and held to bail, but this Plaintiff was not found. He subsequently appeared in the action by attorney, but put in no answer to the complaint; and on the 5th day of November, 1858, judgment was taken against him by default. After this, and on the 11th day of November, 1858, he moved the Court to set aside the default and judgment, whereupon the following order was made: "It is ordered, that the said Defendant have leave to serve his answer to the complaint herein within ten days from the date of the entry of this order, and to proceed with his defence in this action, upon payment to the Plaintiff's attorney of $22.50, being costs of default and of this motion, and also the fees and charges of the Sheriff upon the execution issued in this action. And it is further

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ordered, that said judgment stand as security for the alleged indebtedness of the said Defendant to the Plaintiff." He accordingly paid the costs, fees, and charges mentioned in the order, and served his answer to the complaint. On the 8th of December following, the order of arrest upon which he was arrested and held to bail, and under which the Defendant justifies, was obtained, and the Plaintiff was arrested, and, in default of bail, committed to jail. For that arrest and imprisonment this action is brought.

Upon the trial the Court held that the Defendant was justified by the order, and dismissed the complaint, to which the Plaintiff excepted. The Court ordered the exceptions to be heard in the first instance at the General Term, and that, in the meantime, judgment be suspended. On hearing the exceptions the General Term denied a new trial, and gave judgment for the Defendant, from which judgment this appeal is brought.

Unless the order of arrest upon which the Plaintiff was arrested and imprisoned was void, the judgment is manifestly right. The only question, then, is, was the order of arrest unauthorized and void?

The only ground upon which it is claimed by the Plaintiff to be void, is, that it was made after judgment.

Section 183 of the Code provides, in reference to the making of the order by the Judge by whom it was granted, that "the order may be made to accompany the summons, or at any time afterwards, *before judgment*."

It is clear that this language is a clear prohibition of the making of the order after judgment, and the reason obviously is, that after judgment the need and office of the *provisional* remedy ceases. If the action is one in which an order of arrest may be granted, upon the perfecting of judgment therein, an execution may issue against the person of the Defendant. There can be, therefore, no further need of the order of arrest. This reason helps to construe the provision, and show what is intended by the word "judgment," as it occurs in the section. The Court below, I think, gave it the correct meaning when it held that it meant in § 183,

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what it is defined to mean in § 245, to wit: "the final determination of the rights of the parties in the action." Until such a judgment is obtained—one which may be carried into effect by execution—the point has not been reached where the provisional remedy is no longer necessary; and for this reason, as well as for those assigned by the Court below (8 Bosw. 591), the granting of the order should be held to be limited only by such a judgment.

The judgment which was obtained by default, was undoubtedly such a judgment, until it was modified by the order letting the present Plaintiff in to answer and litigate the claim set up in the complaint, and at the same time directing that the judgment "stand as security for the alleged indebtedness of the Defendant to the Plaintiff." The Court has authority, under its general powers, as well as under § 174 of the Code, in its discretion, and upon such terms as it conceives to be just, to "relieve a party from a judgment," and "allow an answer to be made." In pursuance of this authority it may modify the judgment by depriving it of its ordinary character, as a res judicata, and leaving it in full force as a lien or collateral security (6 Cow. 390; 7 Cow. 477; 2 J. Cas. 286; 9 How. 442). That it clearly did in this case. I agree entirely with the Court below, that, "in substance and in form (the judgment and order of the 11th of November being read together), the judgment is one which neither acknowledges nor establishes any indebtedness of G. S. Mott to the bank, but is a judgment given as security for the payment of any sum that the bank should establish that Mott was liable to pay, and given in order to vacate the judgment in all respects, except to exist merely as such security. It was to perform the same precise office as a judgment confessed without action, for the same purpose, and no other."

The order places the parties back where they were before the judgment was entered, sets aside the default, and provides for the litigation of their rights in the action. The execution of the judgment would be plainly inconsistent with the right to litigate thus conferred. The judgment, then, thus modified, and standing

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only as a lien or security, and not as the final determination of the rights of the parties, was no legal obstacle in the way of a valid order of arrest.

It follows, if this view is correct, that the judgment appealed from is right, and should be affirmed.

Concurring, WRIGHT, GROVER, HUNT, and DAVIES, JJ.

Affirmed.

JOEL TIFFANY,
State Reporter.

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WILLIAM H. VAN KLEEK v. PHILIP LEROY AND WILLIAM H. DEYO.

Fraudulent Representations—Third Party—Evidence of Intent to Defraud.

Upon the question of intent to commit a fraud by the purchase of goods upon credit, it is competent to prove that the same party made fraudulent purchases from other parties, about the same time: such evidence is deemed proper for the purpose of establishing the intent with which the purchase in question was made.

THIS action was brought to recover certain goods on the alleged ground that they had been purchased by William F. Leroy, under fraudulent representations as to his circumstances and responsibility.

A few weeks after the purchase, Leroy made an assignment for the benefit of his creditors to the Defendants. The property, which consisted of groceries, &c., was replevied from the Defendants shortly after the assignment.

It appeared on the trial that William F. Leroy had for some time been dealing with the Plaintiff, and purchasing on credit. That on the 5th December, 1860, he purchased the goods in question. That, at the time of the purchase, Leroy remarked to the Plaintiff, that he was responsible for all the goods he would buy, and was good enough for it.

The Plaintiff made inquiries of others about him. Among them was Mr. Kenworthy. Before he sold him the goods, Leroy had been inquired of by Kenworthy, with reference to a bill he (Kenworthy) was about to sell him, and Leroy informed him that he was worth $2,000 or $3,000, and was perfectly good.

The jury found a verdict for the Defendants. The only exception was to the charge of the Court, respecting the representations to Kenworthy. The Judge charged as follows:

1. That the action was brought to test the title to the property replevied.

2. If the goods were procured from the Plaintiff upon false and

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fraudulent representations by Leroy, of his solvency, no title passed, and the Plaintiff was entitled to recover.

3. That if the Plaintiff made, or was influenced to make the sale, upon the strength of the representations made to Kenworthy, the sale was not for that reason fraudulent, unless the jury further believed that the representations were made to Kenworthy with intent that the same should be communicated to her Plaintiff, and should influence his conduct.

To the latter part of the third item of the charge the Plaintiff excepted. The General Term of the Third District affirmed the judgment at the Circuit, and the Plaintiff now appeals to this Court.

M. Schoonmaker for Appellant.
Erastus Cooke for Respondents.

HUNT, J.—The general principles involved in the question now before us are well settled. A purchase of goods upon fraudulent representations of the situation of the buyer, gives no title to the fraudulent vendee. A purchase of goods, with the preconceived design not to pay for them, is a fraudulent purchase, subject to the same consequences. An actual insolvency at the time of the purchase, but accompanied with an honest expectation, on the part of the purchaser, that he will be able to retrieve his fortunes, and where no representation is made, does not necessarily create a fraud (Hall *v.* Naylor, 18 N. Y. R. 588; Nichols *v.* Pinner, id. 295; Hennequin *v.* Naylor, 24 N. Y. R. 139; Cary *v.* Hotailing, 1 Hill, 311).

It has been repeatedly decided in this State that, in such cases, evidence of fraudulent purchases from parties, other than the Plaintiff, might be proved on the trial, to establish the purpose and intent with which the purchase in question was made.

Thus, in Cary *v.* Hotailing (supra), Judge Cowen said (p. 316): "On questions of intent to defraud, other acts similar to the offence charged, done at or about the same time, or when the same motive to offend may reasonably be supposed to have existed, as that which is in issue, are admissible with a view to the quo

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animo. The case of fraud is among the few exceptions to the general rule, that other offences of the accused are not relevant to establish the main charge."

In Hall v. Naylor (sup.), Judge Comstock says: "On the trial of such an issue the quo animo of the transaction is the fact to be arrived at; and it is, therefore, competent to show that the party accused was engaged in other similar frauds, at or about the same time. The transactions must be connected in point of time, and so similar in their other relations that the same motive may reasonably be imputed to them all."

It was accordingly held that a representation made to a former seller, who had become alarmed, but where debt was not due, was not competent evidence.

In Hennequin v. Naylor (sup.), after laying down the general rule, Judge James says: "In cases where there is no overt act of fraud, it is often very difficult to prove a dishonest purpose. In all such cases, instead of proving false representations, or other fraudulent practices, resort is had to various incidents and circumstances which are calculated to exhibit the hidden purposes of the actor's mind. So in this case: Kerr and Adams were not guilty of any overt act of fraud in the purchase of the goods sought to be recovered; nor did they make any representations as to their pecuniary condition, and hence proof was made of their pecuniary situation, the facts and circumstances connected therewith, and their acts and conduct in relation to their other purchases, and as to this purchase, in order to determine the motive and intent with which it was made."

In each case, as it is presented in Court, a substantial cause of action must be established by the Plaintiff. He must prove a purchase and a fraudulent intent existing in the mind of the purchaser, when he purchased the goods, to obtain the property without paying for it. This may be done by proof of direct statements, which are shown to be untrue, or by proof of circumstances tending to the same result. In the case before us, the purchaser made a direct representation, as testified to by the Plaintiff, which would have justified the jury in finding that the pur-

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chase was fraudulent. The Judge charged, in relation to this point, that if the goods were purchased by statements which were false, and known to be so by the purchaser, no title passed.

This was a sound exposition of the law, and was all that either party had a right to ask.

It was said, however, that the purchaser had made a fraudulent representation to Mr. Kenworthy, upon making a purchase from him, at about the same time. Proof of this fact was made, and it would have been erroneous to have excluded it. It was competent evidence of a distinct offence, to establish the quo animo in the case in hand.

It was not, however, of itself competent to establish the Plaintiff's cause of action. On the trial of a prisoner charged with passing counterfeit money, it is competent to prove that the accused offered similar money at about the same time to other persons, but upon the question of intent only. Proof that he attempted to pass his spurious money upon a dozen other persons would afford no legal evidence that he had passed it to the prosecutor, or that it was spurious. These are the points in issue to be first established by independent evidence, and when established the intent may be aided by the extrinsic transactions. There is no legal connection between an attempt to cheat one person and an attempt to cheat another. Nor is there any legal objection to the idea that a counterfeiter or a purchaser may intend to cheat one person, and not wish or intend to cheat another.

The fraud upon the Plaintiff here must be established by competent proof. An attempt to defraud Kenworthy affords no legal evidence that the same man attempted to defraud Van Kleek. An undisciplined mind might say that if Leroy would cheat one man, he would cheat another; and it appearing that he cheated Kenworthy, I will assume that he cheated the Plaintiff. This, however, is neither law nor logic.

The authorities I have cited show that this fact was competent to be proved, as bearing upon the motive and intent of Leroy in making the purchase. It was a balanced case. The Plaintiff proved representations, as well as numerous facts and circumstances, tend-

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ing to show that Leroy intended to defraud him in making the purchase.

The Defendants showed various facts and circumstances tending to re-establish the good faith of the purchase. That being the precise point in controversy, it became quite important to establish the fraudulent representation to Kenworthy.

If he had attempted to cheat him, the jury could give such effect to that fact as they thought proper, in determining the question of good or bad faith then before them. This fact the jury had, and this was all they were entitled to.

To hold that the fraud upon Kenworthy, which was not committed upon the Plaintiff, and the statement upon which it was based, was intended by the purchaser to be communicated to him, established the Plaintiff's cause of action, would be going beyond any reported case, and beyond all sound principle (Allen *v.* Addington, 7 Wend. 9).

The representations must be made to the seller (when representation is the mode of fraud resorted to), or must have been intended to be communicated to him. Statements to a stranger, not intended for the Plaintiff, cannot give a ground of action. Each case depends on its own circumstances, and must be decided upon its own facts.

Judgment should be affirmed.

All affirm, except GROVER, J.

GROVER, J. (dissenting).—The question for the determination of the jury in this case was, whether Leroy purchased the goods in question with the fraudulent intent of not paying therefor, and thus of defrauding the Plaintiff of their value. The Plaintiff, among other things, gave evidence tending to show that Leroy, at about the time of the purchase in question, purchased goods of one Kenworthy, and, as an inducement to Kenworthy to make the sale, made false and fraudulent statements as to his pecuniary circumstances and ability to pay for the goods so purchased, which statements were communicated by Kenworthy to the Plaintiff before the sale to him.

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The Judge charged the jury, that if the goods were purchased by Leroy of the Plaintiff, upon false and fraudulent statements to him by Leroy, he knowing them to be false, and that he procured the goods upon such false representations, no title passed.

The Judge further charged, that if the goods were sold by the Plaintiff to Leroy, upon the strength of the representations made by Leroy to Kenworthy, or the Plaintiff was influenced to make the sale by such representations to Kenworthy, the sale is not for that reason fraudulent, unless the jury further believe that such representations to Kenworthy were made by Leroy to be communicated to the Plaintiff, and with the intent to influence the Plaintiff to give him (Leroy) credit.

The Plaintiff's counsel excepted to this latter portion of the charge. Had the action been to recover damages of Leroy for inducing the Plaintiff to sell him goods upon credit, by false and fraudulent statements, this portion of the charge would doubtless have been correct. In such a case, the statements must be made to the Plaintiff, either by the Defendant himself, or by his authority. But this was an entirely different case. The question in this case was whether the Defendant made the purchase in question with the fraudulent intention of cheating the Plaintiff out of his goods, by not paying therefor.

In this class of cases, other purchases made fraudulently so near the time of the one in question that the purchaser may be presumed to have acted upon the same design, may be given in evidence to show the intention with which the one in question was made, or, at least, as reflecting some light as to such intention (Hall *v.* Naylor, 18 N. Y. 588, and cases cited). For this purpose it is immaterial whether the statements made upon the other purchases were communicated to the vendor previous to the sale or not. True, if made with the design of their being communicated, it might add somewhat to the force of the evidence; but even this might depend upon other circumstances. In the present case, from that portion of the charge not excepted to, taken in connection with that excepted to, the idea conveyed to the jury was, that the fraudulent statements made to Ken-

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worthy, upon the purchase from him, were not material, unless communicated to the Plaintiff, by the authority of Leroy, previous to the purchase from him. This was error.

The judgment must be reversed, and a new trial ordered.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THE FARMERS & MECHANICS' BANK OF GENESEE, RESPONDENT, v. JASON PARKER, IMPLEADED WITH JOHN STEVENS AND HARRY CHASE, APPELLANT.

Bill of Exchange—Usury—Acceptance by Drawee—Customary Rate of Discount.

The drawee for whose benefit a draft is drawn and procured to be discounted, and the proceeds of which are paid over to him, is a substantial party to such draft, and liable, independent of any question of acceptance of said draft.

APPEAL from the Superior Court of the City of Buffalo. The action was upon a bill of exchange for $3,500, drawn on the 7th of Nov., 1860, at Toledo, Ohio, by Stevens & Chase, of that place, discounted by the Marine Bank at Toledo for the drawers, and after acceptance by the Defendant, to whom it was addressed, rediscounted by the Plaintiff, a bank at Buffalo.

The defence alleged in the answer was, that before it was accepted by the Defendant, the draft had been discounted for the drawers by the Marine Bank of Toledo, at a usurious rate of interest, in violation of the laws of Ohio; that the Defendant accepted it without further consideration, and that the Plaintiffs afterwards took the paper with notice of these facts.

The cause was tried before Judge Clinton, without a jury; and the following is a statement, in substance, of the material findings:

The statute of Ohio on which the Appellant relies, is entitled: "An Act to authorize the business of banking." The Marine Bank was organized under the Act, and the Defendant claims that the loan to the drawers was in violation of the 24th section, and that the draft was, therefore, usurious and void. That section is as follows: "Every banking company deriving any of its powers and privileges from this act, may take, reserve, receive and charge, on any loan or discount made, or upon any note or bill of exchange, or other evidence of debt, at the rate of six per centum per annum on the amount of any such note, bill of ex-

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change, or other evidence of debt, so discounted, and no more; provided, however, that interest may be reserved, or taken in advance, at the time of making the loan or discount, according to the usual rules of banking, or as calculated in Rowlett's tables; and the knowingly taking, reserving, or charging, on any debt or demand payable to such company, of a rate of interest greater than that allowed by this section, shall be held and adjudged a forfeiture of such debt or demand; but the purchase, discount, or sale of a bill of exchange payable at another place than the place of such purchase, discount, or sale, at *the current discount or premium*, shall not be considered a taking, reserving, or receiving interest, provided no agreement or understanding shall be made that the same shall be *paid* at any other place than that at which it is made payable" (1 Swan's R. S. of Ohio, p. 139, § 61).

The bill in question was made payable to the order of Wm. Hitchcock, the cashier of the Marine Bank, who made the usual cashier's endorsement in behalf of the bank. On the day, or the day before the draft was made, Stevens and Chase made application for the discount of a draft, payable in the city of New York. They refused this, but proposed to discount two drafts of $3,500 each, drawn on the Defendant, at Buffalo; the officers stating as a reason, that the bank was short of currency, and they would have to charge one-half of one per cent. to procure a rediscount, and that the bank could make more if the drafts were drawn on Buffalo than it could if they were made payable in New York: that the bank wanted to make one per cent. a month, and could do about that by charging one-half of one per cent. for collecting, in addition to six per cent. interest in advance; that the bank could procure a rediscount at Buffalo, and designed to do so. It was accordingly agreed that the two drafts should be made on Buffalo, and be discounted for the drawers by the Marine Bank. It was usual for the banks at Toledo to charge one-half of one per cent. for collecting paper payable in Buffalo, and the usual course of business was, for the banks in Buffalo to collect for the banks in Ohio paper payable in Buffalo, and remit the proceeds to the city of New York for one-half of one per cent.

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The bill of exchange in question was drawn in pursuance of the agreement so made, and was discounted by the bank. The bank retained, on such discount, six per centum per annum in advance, for the time the bill had to run; also one-half of one per cent. on the amount of the bill, being the usual charge for collection, and paid to the drawers the proceeds of the draft, after these deductions. The bank immediately transmitted the bill to the Plaintiff, at Buffalo, with a request to discount it and remit the proceeds to the city of New York. The Defendant had not then accepted the bill. The Plaintiff procured the Defendant's acceptance, and thereafter discounted the bill for the Marine Bank of Toledo, retaining, by way of discount, at the rate of seven per cent. per annum, and remitted the avails by draft to the city of New York, less the current rate of exchange, to the correspondent of the Marine Bank of Toledo. The current rate of exchange between Toledo and Buffalo, during the year 1860, was one-half of one per cent. in favor of Buffalo; as between Toledo and New York, it was one per cent. in favor of New York; and as between Buffalo and New York, one-half of one per cent. in favor of New York. The Plaintiff, in making discount, acted in good faith, and without notice of any usury in the original discounting of the bill of exchange.

The Defendant resided in Buffalo, and he was the consignee and factor of Stevens and Chase, who were produce merchants in Toledo. This business relation had existed between them for a number of years. Messrs. Stevens and Chase had for several years raised funds to purchase grain by the discount of drafts, on an understanding that the funds thus raised should be used in purchasing grain, and the grain should be consigned to the Defendant for sale. A general account was kept between them, but the remittances of Stevens and Chase, and the proceeds of the property they consigned to the Defendant for sale, did not equal their drafts, so that the Defendant had been for three or four years, and still continued to be, their creditor, on account of his acceptances, to an amount exceeding $20,000. On the general understanding, however, stated above, he continued to honor

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their drafts, and accepted that in question, the proceeds of which were procured and used in pursuance of such understanding.

The Judge found, as matter of fact, that by the laws of Ohio, all bills of exchange discounted in violation of the provision above cited from the banking act, are usurious and void; but that by the laws of that State, the discount in question was not usurious.

He accordingly rendered judgment in favor of the Plaintiffs for $3,791.96, which was affirmed on appeal to the General Term.

E. C. Sprague for Appellant.

John Ganson for Respondent.

PORTER, J.—The defence alleged in the answer is founded on the supposed violation of a statute of Ohio by the parties to the original discount. The Appellant is met at the outset with the serious difficulty that he produces no finding, as matter of fact, that the discount in question was in violation of the laws of Ohio. The Judge, on the contrary, finds that it was not in contravention of those laws; and, as the cause was tried without a jury, we are bound, in support of the judgment, to make every rational intendment consistent with the facts specifically found (Carman *v.* Pultz, 21 New York, 547; Grant *v.* Morse, 22 id. 323).

There is nothing to warrant us in assuming, against the finding of the Judge, that the reservation in Ohio, by one of the banks, of the usual percentage for collection on bills payable elsewhere, was an unauthorized or illegal exaction. The amount retained as interest, eo nomine, was just what the bank was entitled to claim. It appears that, on cash transactions, the rate of exchange was then in favor of Buffalo; but, on time loans payable in Buffalo, we are bound to assume, in accordance with the tenor of the findings, that there was a current discount at Toledo of one-half of one per cent., being the customary cost of collection. The section of the statute on which the Defendant relies, provides, in substance, that the discount of a bill of exchange payable elsewhere at the "current discount," shall not be considered as a taking or reservation of interest within the meaning of the act,

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unless there be an understanding that the bill is not to be paid at the place so named. In this case, it is not claimed that there was any such understanding; and there is nothing in the findings to justify us in holding that the customary charge of the Toledo banks for collection was a mere cover for usurious extortion.

If the discount was at a rate allowed by law, it was not rendered usurious by any legitimate use which might afterwards be made of the paper, or by the acknowledged purpose of the bank at the time to apply it to such future use. That was a matter in which the borrowers had no concern. The lender was entitled to retain the security in his own hands, or to make any lawful disposition of it which would tend to his interest or advantage. If the bank, by submitting to a rediscount at the rate of seven per cent., could supply itself at once with current funds in New York at an expense equivalent to the mere cost of collecting the draft at maturity, the rediscount secured a legitimate benefit to the lender, without prejudice or loss to the borrower. Indeed, in the present case, the course adopted seems to have been attended with advantage to both; for the drawers, in the first instance, proposed a discount of their draft on New York which would have been perfectly legal, but would have added one-half of one per cent. to the amount to be paid at maturity, by reason of the difference of exchange, aside from the current charge for collection. In any view of the case which we are at liberty to take upon the facts found by the Judge, the transaction was not usurious under the laws of Ohio.

But even if this were otherwise, the defence, under the usury laws of that State, would be unavailing against the Plaintiffs, who were purchasers in good faith, without notice of the antecedent facts. With us the rule is different; but it is to be borne in mind that the Defendant's answer does not allege a usurious agreement in violation of the laws of New York, and no application for an amendment was made at any time in the Court below. The rights of the parties must be determined with reference to the laws of the State in which the discount was made.

The usury statute of Ohio is applicable only to banking corpo-

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rations; and, unlike our own, it merely declares a forfeiture of the debt as between the lender and borrower, without annulling the contract. In respect to the bank making the illegal loan, the contract is void; not because the statute so declares it, for it contains no such declaration, but simply because the contract is ultra vires, as the Courts of that State have repeatedly held (Bank of Chillicothe *v.* Swayne, 8 Ohio, 257; Creed *v.* Commercial Bank of Cincinnati, 11 id. 489; Miami Exporting Co. *v.* Clark, 13 id. 1; Bank of Wooster *v.* Stevens, 1 Ohio State R., N. S., 233; Busby *v.* Finn, id. 409; Preble Co. Bank *v.* Russell, id. 313). In respect to purchasers of commercial paper in good faith for value, it is no defence, under the laws of Ohio, that the contract was usurious as between the original parties. It so happened that this precise point was adjudged in that State, by the ultimate appellate tribunal, in the interim between the trial of the present action and the decision rendered by Judge Clinton (Pickaway Co. Bank *v.* Prather, 12 Ohio State R., 497, 511). Even if the question were doubtful, we should hesitate to oppose our opinion of the true construction of a statute of another State, to the judgment of its own Court of last resort; but in this instance, it is proper to say, that we fully concur in the reasoning, as well as the conclusions, of the tribunal by which that judgment was pronounced.

As these views are controlling, it is needless to consider other questions very fully and ably discussed by the respective counsel, but not necessarily involved in the decision.

The judgment should be affirmed.

All the Judges concurring, except BOCKES, J., who was absent,

Judgment affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

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FARMERS & MECHANICS' BANK OF GENESEE, RESPONDENT, v. DANIEL M. JOSLYN AND OTHERS, APPELLANTS.

Foreclosure—Original Contract—Usury—Subsequent Taint—Practice—Amendment of Complaint.

A party claiming to be the victim of usurious exaction cannot avail himself of the invalidity of a later contract to shield himself from liability on one of an earlier date, which was honest and free from vice.

When a new note was given, including as a part of the consideration thereof the amount of a note previously due and unpaid, the fact that the new note was void for usury will not shield the party from the payment of the original note.

APPEAL from the Supreme Court. The action was for the foreclosure of a mortgage to the Plaintiff, as a continuing security for the payment of all commercial papers then or thereafter to be held by the Plaintiff, on which Daniel M. Joslyn was liable, or might become so at any subsequent period. The complaint originally framed alleged his liability in the sum of $1,500, with interest, for which the Plaintiff held his note, bearing date the 24th of Dec., 1860, payable thirty days from date. The Defendants, other than William Joslyn, who disclaimed any interest in the mortgaged premises, alleged, by way of defence, that the note of that date was void for usury, having been discounted at a rate of interest exceeding seven per cent. The Court, at Special Term, directed the trial of the issues of fact, presenting the question whether the note was discounted at a usurious rate of interest. On the trial of these issues at the Erie Circuit, before Mr. Justice Grover, who had directed and framed them at Special Term, it appeared by evidence on both sides that the note in question was given in renewal of a previous note to the Plaintiff which matured on the 10th of December, and that such prior note, which was free from any taint of usury, was never paid otherwise than by the discount of the renewal note, and that the whole amount remained due, except one month's interest, which was paid.

Upon these facts appearing, the Plaintiff's counsel applied for the framing of additional issues for the purpose of presenting

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the whole case together. The Defendants' counsel objected, insisting that no such issue was presented by the pleadings; that there was no opportunity to plead, or to prove any defence they might have to the original note; that the verdict should be conformed to the issues as settled, and that the Court had no power, *at that time*, to change or modify the previous order.

The Judge granted the application, no affidavit being made by Defendants of prejudice or surprise; and on the issues as modified, the jury found that the renewal note was discounted at a usurious rate of interest, but that, with the exception above noted, the original note was due to the Plaintiff, and that it remained unpaid otherwise than by the proceeds of the usurious discount.

A case was made by the Defendants, upon which, together with the findings of the jury, the cause was heard before Mr. Justice Hoyt, at Special Term. At the hearing, the Plaintiff moved for leave to amend the complaint in conformity with the proof and the findings. The motion was resisted, on the ground that such an amendment would wholly change the Plaintiff's cause of action, and that the Defendants would have no opportunity to try the issue presented. No affidavit was made on the part of the Defendants, and the amendment was allowed by the Court, and the Defendants were not allowed to put in a further answer.

The trial resulted in the finding by the Court of substantially the same facts previously found by the jury, and in the usual judgment of foreclosure for the amount of the original note, with interest. The judgment was affirmed on appeal to the General Term, in the Eighth Judicial District, and the Defendants appealed to this Court.

J. M. Humphry for Appellants.
John Ganson for Respondent.

PORTER, J.—The judgment is in exact accordance with the legal rights of the parties. The Court refused to enforce the illegal agreement, and it also declined to permit its perversion to a use injurious to the Plaintiff and beneficial to the Defendants, but to which the latter were not entitled either in conscience or in law.

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The infected contract did not absolve the mortgagor from his antecedent obligation, nor did it impair the rights of the Plaintiff under a prior and valid agreement. It is true that the usurer is not permitted, *at his own election*, to allege an illegal act as a ground for reinstating an old security; but it is equally true that a party who claimed to be the victim of exaction cannot avail himself of the invalidity of a later contract, as a shield from liability on one of an earlier date which was honest and free from vice (Brown *v.* Dewey, 1. Sandf. Ch. R. 56; Swartwout *v.* Payne, 19 Johnson, 294; Billington *v.* Wagoner, 33 New York, 31; La Farge *v.* Herter, 5 Selden, 241; Crane *v.* Hubbell, 7 Paige, 413). It appeared on the trial that the paper in question was discounted for the sole purpose of renewing a note previously due and dishonored, and of which the payment was secured by the mortgage set forth in the complaint. To meet the case in this new phase, the Judge submitted to the jury such additional issues as were essential to bring to the view of the Court all the facts material to a just and intelligent decision. To this we see no well founded objection. He was invested with the same power at the Circuit which he exercised at Special Term in framing the original issue. It was a question addressed to his sound discretion. We think he was clearly right in the disposition which he made of it; but if we entertained a different opinion, we should not be at liberty to reverse the judgment on a question of mere practice, in respect to which the Court below is the ultimate arbiter.

The order of the Court, conforming the pleading to the proof and the findings, was made in the exercise of a like discretion. It involved no change in the form of the action, or in the nature and substance of the claim. The Defendants were not taken by surprise, and they suffered no legal prejudice from the amendment.

The judgment should be affirmed.

All the Judges concurring,

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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THE CITY BUILDING AND LOAN COMPANY, RESPONDENT, v. GEORGE L. FATTY, IMPLEADED, &c., APPELLANT.

Foreclosure—Building Associations—Usury—Practice—Findings of Fact.

This Court cannot go beyond the findings of the Special Term to determine whether the conclusions of law are erroneous. If a party desires to present questions of fact, he must present them through the proper findings of the Judge, referee, or jury.

PARKER, J.—This action is brought to foreclose a mortgage executed to the Plaintiff by George L. Fatty and Louisa Fatty his wife. It was tried at a Special Term of the Supreme Court of the city of Buffalo, and resulted in a decision in favor of the Plaintiff, upon which judgment was rendered, which the General Term of that Court, on appeal, affirmed. The record shows no findings of fact by the Special Term, and its only conclusions of law are the decision, "that there is due to the Plaintiff, on the bond and mortgage mentioned and set forth in the complaint, the sum of $756.88;" and the direction that "judgment be entered for a foreclosure and sale," containing the ordinary provisions and directions, including the one that, if the moneys arising from the sale be insufficient to pay the amount due, &c., "the Defendant, George L. Fatty, who is personally liable for the payment of the debt secured by the bond and mortgage, pay to the Plaintiff the amount of such deficiency," &c. These conclusions and decisions were excepted to by the Defendant.

Inasmuch as the Appellant has failed to bring before this Court the facts of the case in the only way authorized by the Code—that is, by the *findings* of the Court at Special Term (Code, § 268, subd. 2 and 3)—it is quite impossible for us to say that there is any error in the decision of the Special Term.

The allegations of error made by the Appellant's counsel in his points are, that the loan for which the bond and mortgage were given was usurious; that the Plaintiff had no corporate authority to exact *any* interest, and hence the act of loaning on interest was

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ultra vires; that the bond was illegal and void, because it does not appear that the advance was made for the objects contemplated by the act under which the Plaintiff became incorporated, and that the bond was both usurious and illegal, because neither Defendant Fatty nor his wife were stockholders in the association when the loan was granted, and therefore the loan is not saved from being usurious by the provisions of the act on that subject.

It is manifest that all these objections to the Plaintiff's right to a judgment in its favor rest upon assumed facts. We cannot go into an examination of the evidence to see whether the facts necessary to sustain the objections exist (Grant v. Morse, 22 N. Y. R. 323; Cady v. Allen, 18 N. Y. R. 573; Phelps v. McDonald, 26 N. Y. R. 82; Leland v. Cameron, 31 N. Y. R. 115).

If we look into the pleadings to see whether the necessary facts on which to raise the Defendant's objections there stand admitted, we find that no facts are there admitted. The answer contains a general denial of all the allegations of the complaint. Neither is there any defect in the Plaintiff's case, as stated in the complaint, which, even if taken as it there stands, presents any obstacle to the judgment. It is true, as the Defendant's counsel insists, that the bond therein set forth requires the payment of seven per cent. interest on the whole principal sum of $1,800, notwithstanding it also requires the monthly reduction of such principal by the payment of instalments of $9 per month. But these payments are to continue only "until the object of the said The City Building and Loan Association, as contemplated in and by its articles of association, should be attained and accomplished"—that is, until the fund accumulated shall amount to $200 per share, when it is to be returned to the members of the association. The money loaned, therefore, is not to be absolutely repaid; and the requirement to pay interest on the whole principal, after it shall have been reduced by the monthly instalments, does not make the bond usurious. There is nothing in the complaint showing how nearly the Defendant's share, or the whole number of shares into which the stock of the association was divided, was paid up, and consequently nothing showing but that $200 per share would be ready

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to be returned to the members entitled to it, and thus the "object contemplated by the articles of agreement be attained and accomplished" upon the payment of the first monthly instalment required by the bond.

In regard to the objection that the loan upon interest was beyond the corporate authority of the Plaintiff, we find, upon looking into the act, that it contemplates the making of loans to members of the association, without prohibiting loans upon interest. The taking of interest is so much the ordinary incident to a loan, that the authority to loan implies it, and it was not an act ultra vires in the corporation to make a loan on interest. The other objections resting wholly upon facts assumed, but not shown to exist, must also fail to be sustained. The judgment should be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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JOHN H. WILLIAMS, RESPONDENT, v. CHESTER F. SHELLY, APPELLANT.

Execution—Sale in Good Faith—Principal and Surety—Consideration—Liability.

The assumption of a new liability is a good consideration to constitute the party assuming it a purchaser in good faith.

Where a surety of the parties purchased of them their stock of goods, and agreed to assume their liabilities, and to indemnify them against their indebtedness for the same, his relation as surety for them became changed to that of principal; and that change of relation and new liability furnished a sufficient consideration to constitute him a purchaser in good faith.

As against a purchaser in good faith, an execution does not become a lien on the personal chattels of the debtor until actual levy.

THIS action was brought in the Supreme Court to recover damages for the alleged conversion of a quantity of dry-goods by the Defendant.

Upon the trial at Circuit it was proved that Mitchell & Derry were, in the spring of 1857, carrying on mercantile business, as partners, in Niagara county. That at that time they went to New York, and agreed for the purchase of a large amount of goods. That some of the purchasers refused to deliver the goods without security. Thereupon Mitchell & Derry wrote to the Plaintiff to come to New York. That the Plaintiff went to the city, and there became surety for Mitchell & Derry for the price of the goods, which were then delivered and forwarded to the store occupied by Mitchell & Derry. The evidence was conflicting upon the question whether it was agreed between the Plaintiff and Mitchell & Derry that the former should become a partner in the business. It was claimed, upon the part of the Plaintiff, that such an agreement was made.

On the twenty-first of May, 1857, an agreement in writing was entered into between the Plaintiff and Mitchell & Derry, by which the partnership was declared to be dissolved, and Mitchell & Derry transferred to the Plaintiff all their interest in the goods for which the Plaintiff had become security, and the Plaintiff

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agreed to pay for said goods, and to indemnify Mitchell & Derry against their liability therefor. It was further proved that the Plaintiff took possession of the goods, and that the Defendant thereafter took and sold the goods.

On the part of the Defendant, it was proved that he was sheriff of Niagara county; that before the twenty-first of May several executions were placed in his hands against Mitchell & Derry, with instructions not to levy until further directions; that shortly before the 21st of May, another execution against Mitchell & Derry was placed in his hands for collection; that he, shortly after the 21st of May, levied upon the goods in question, by virtue of such executions, and sold the same thereon.

The several judgments upon which the executions were issued, were proved, and evidence was given tending to show that Plaintiff was aware of the insolvent condition of Mitchell & Derry, and also of the existence of judgments against them. The Defendant's counsel requested the Judge to direct a verdict for the Defendant. This was refused, and the Defendant's counsel excepted. The counsel further requested the Court to charge the jury, that if the only consideration of the sale to the Plaintiff was the execution of the agreement, by which the Plaintiff agreed to assume and pay the debts therein specified, then the Plaintiff was not a purchaser in good faith, &c. The Court refused so to charge, and the Defendant's counsel excepted.

The Defendant's counsel further requested the Court to charge, that if the sale was only intended as a security, then it was not within the protection of the statute, although in good faith. The Court refused, and Defendant excepted.

The Court charged the jury that it was necessary, to charge the property with the lien of the execution, that the Defendant should show, and the jury should find, that the Plaintiff had notice, in some form, of the issuing of the execution; that notice of the judgment was not sufficient; that if the bill of sale was intended as a security for endorsing the notes, and was without other consideration, yet if the same was in good faith, before levy, and without notice of the issuing of the execution, the

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Plaintiff's right to the goods would be superior to that of the sheriff under the execution. To which several rulings, the Defendant's counsel excepted.

The jury found a verdict for the Plaintiff.

The Defendant moved, at Special Term, to set aside the verdict, which was granted, unless the Plaintiff stipulated to remit a portion of the damages found by the jury.

The Plaintiff gave the stipulation required, and entered judgment for the residue, from which the Defendant appealed; and after affirmance by the General Term, appealed to this Court.

Davis & Piper for Respondent.

P. L. Ely for Appellant.

GROVER, J.—There was no exception to any ruling of the Court, upon the question of damages, taken upon the trial. No such question can therefore be entertained by this Court. It was competent for the Special Term, in case the damages found were excessive, to order a new trial, unless the excess was remitted by the Plaintiff, and in that event, to deny it. The action of the Special Term in that respect, under the facts of this case, cannot be reviewed here. At common law an execution bound the personal property of the Defendant, from its teste, even against a bonâ fide purchaser (Cro. Eliz. 174; Audley *v.* Halsey, Cro. Car. 148). This was altered by 29th Car. 2, ch. 3, § 16, making such purchase valid, if made before the delivery of the writ to the sheriff. Section 13 (2 R. S. 365) provides that the goods and chattels of a debtor shall be bound only from the time of the delivery of an execution to be executed. Section 17 provides that the title of any purchaser in good faith, of any goods or chattels acquired prior to the actual levy of any execution, without notice of such execution being issued, shall not be divested by the fact that such execution had been delivered to the officer prior to such purchase. The exceptions in the present case present the question whether the consideration was such as to constitute the Plaintiff a purchaser in good faith, within the meaning of the statute. There was no conflict in the evidence upon that point. The Plaintiff

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had become surety for the payment for the goods, upon the purchase by the execution debtors. He agreed, upon his purchase of their interest from them, to pay this indebtedness, and to indemnify them against it. He thus assumed a new liability. He became the principal debtor, instead of surety for others. The assumption of a new liability has always been held a sufficient consideration to constitute the party assuming it a purchaser in good faith. The requests of the Defendant's counsel to charge upon this point were properly denied, upon the ground that the proof did not warrant the submission of any question to the jury upon this point.

The same answer may be given to the charge as given. The Judge would have been warranted by the proof in directly charging the jury that the consideration was sufficient.

It was not possible that the Defendant could have been prejudiced by the charge in this respect.

It is insisted by the Plaintiff's counsel that a transfer of property to secure an antecedent debt, is a sufficient consideration within the statute; and the counsel cites Birdseye v. Ray (4 Hill, 158; and same case, 5th Denio, 619) in support of this proposition. The opinion of Nelson, J., as reported in Hill, sustains it; but the case was decided upon another ground. It was controverted by the Chancellor in Denio, but the point was not passed upon by the Court. The question cannot be regarded as settled by this case, as adjudged in either court. Although the question is not necessarily involved in the present case, I will remark that I can see no reason, either in principle or upon authority, why any consideration should make a purchase bonâ fide under this statute, that will not have the same effect in any other case, when necessary to sustain a title, on account of a defect in that of the vendor. The charge upon the question of notice of the issuing of the execution to the Plaintiff, presents a nicer question. The charge implies that the onus was upon the sheriff to prove that the Plaintiff had notice of the issuing of the execution at the time of the purchase.

We have seen that the lien attaches upon the delivery of the

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execution to the officer for collection; that this lien is valid against all but purchasers in good faith, without notice.

It would seem to follow that the onus was upon the purchaser to establish all the facts essential to show his title valid against the lien. This he does primâ facie when he shows a purchase in the ordinary course of business. The statute was passed before parties were competent witnesses in their own behalf. Under such circumstances it would have been impossible for the Plaintiff to prove a want of knowledge of the delivery of the execution. The Defendant, upon this point, holds the affirmative, and it is a general rule of evidence that a party alleging the affirmative must prove the fact. To this rule there are some exceptions, but this, I think, does not come within them.

It is a well-settled rule in equity, that when notice of some fact will subvert a title, valid in its absence, such notice must be proved by the party alleging it, although in pleading his title notice must be denied.

My conclusion is, that the charge in this respect was correct, and that the judgment must be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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FRANKLIN B. SEACORD, RESPONDENT, v. CALEB MORGAN AND JOHN WARRIN, APPELLANTS.

Practice on Appeal—Undertaking—Surety—Liability on Affirmance as to one Defendant.

The conditions of an undertaking on an appeal from a judgment against two Defendants, Appellants, being that the sureties should be liable on condition that the judgment on appeal should be affirmed; and the judgment on appeal was affirmed as to one of the Defendants, and reversed as to the other. Held, that the sureties were liable the same as though the judgment had been affirmed as to both.

Wm. H. Taggard for Appellants.
S. E. Lyons for Respondent.

DAVIES, CH.J.—In the year 1850, the Plaintiff in this action commenced a suit in the Supreme Court of this State against Nicholas Miller and Leonard P. Miller. The Plaintiff claimed to recover upon a promissory note made by Nicholas Miller, and endorsed by Leonard P. Miller. The maker and endorser, though not jointly liable, were, in pursuance of the provisions of our statute, united as Defendants in the same action. Such proceedings were had in the Supreme Court, that, on the 20th day of April, 1853, the Plaintiffs herein recovered judgment against said Nicholas Miller and Leonard P. Miller, Defendants, for the sum of $261.54.

The Defendants in that action appealed from said judgment to this Court, and thereupon the Defendants in this action, for the purpose of making said appeal effectual, and in compliance with the provisions of the Code, made and executed to the Plaintiff in this action an undertaking, in the usual form, with a condition therein, in these words: "Now, therefore, we, John Warrin and Caleb Morgan, do hereby, pursuant to the statute in such case made and provided, undertake that the said Appellants will pay all costs and damages which may be awarded against them on said appeal, not exceeding two hundred and fifty dollars; and do also undertake, that if the said judgment so appealed from, or any

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part thereof, be affirmed, the said Appellants will pay the amount directed to be paid by said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against said Appellants on the said appeal."

Upon such appeal, this Court affirmed the judgment of the Supreme Court against Nicholas Miller, the maker of said promissory note, and reversed the judgment of the Supreme Court against said Leonard P. Miller, endorser of said note, and judgment was rendered in his favor (Seacord *v.* Miller, 3 Kern. 55).

The Plaintiff now brings an action upon said undertaking, and avers that the said judgment mentioned in said undertaking was affirmed as to the said Appellant Nicholas Miller, with costs, and reversed as to the said Appellant Leonard P. Miller. That judgment had been perfected in said Supreme Court, upon the judgment of said Court of Appeals, and that an execution had been issued for the amount thereof against the property of said Nicholas Miller, and that the same had been duly demanded of said Nicholas Miller, and that the Defendants had notice thereof. The Defendants denied all the matter set forth in the complaint, and the action was referred to William Kent, as referee, who found all the facts, as stated and set forth in the complaint; also, that the amount of said judgment against said Nicholas Miller was $479.42, besides interest; and that the same had not been paid, nor any part thereof, but that the same remained unpaid, and entirely unsatisfied; and found, as conclusions of law, that the undertaking was a valid obligation; that the judgment entered against the said Nicholas Miller in the Supreme Court, on filing the remittitur from the Court of Appeals, was duly entered against him, affirming the said judgment so appealed from, and that by the affirmance of the judgment against Nicholas Miller, and the facts in said report contained, the Defendants became bound and indebted to the said Plaintiff for the amount of said judgment, and the interest thereon. Judgment was accordingly entered for the said Plaintiff, and on appeal the same was affirmed at General Term, and the Defendants now appeal to this Court.

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The only question of a serious nature urged upon us for a reversal of this judgment is, that as it appears affirmatively that the judgment appealed from was against two Defendants, and as it was affirmed only as to one Defendant, and reversed as to the other, the event or contingency upon which these Defendants agreed and undertook to pay the judgment appealed from, has never happened. They undertook, that if the judgment so appealed from be affirmed, then the Appellants would pay the amount directed to be paid by the said judgment, and all damages which might be awarded against the said Appellants on the said appeal.

The Defendants contend that the judgment so appealed from has not been affirmed.

There is some plausibility, it must be confessed, in this position, and it has been sustained by a very ingenious and able argument by the counsel for the Appellants, and were it an open question in this Court, it would be proper to proceed with the discussion of the views suggested.

But as we understand, the precise question now presented was considered and passed upon by this Court in the case of Gardner *v.* Barney and Butler, decided here in December, 1863—not reported. That was an action upon an undertaking given by the Defendants, on an appeal from a judgment of the Special Term to the General Term of the Supreme Court, taken by the Defendants Ogden and Smith. The judgment of the Special Term was against both Defendants, and the appeal was from that judgment by them to the General Term. And the undertaking was similar in form to that given by these Defendants. The General Term of the Third District reversed the judgment, and ordered a new trial. From this order the Plaintiff Gardner appealed to this Court, and this Court reversed the order of the General Term, granting a new trial, so far as it related to the Defendant Smith, and affirmed the judgment of the Special Term as to him, with costs. It also affirmed the order granting a new trial as to the Defendant Ogden, and gave judgment in his favor against the Plaintiff, with costs (Gardner *v.* Ogden, 22 N. Y. 327).

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The action in this Court above referred to, against Barney and Butler, was upon the undertaking given on the appeal taken by Ogden and Smith from the judgment against them at Special Term to the General Term; and the question as stated by Denio, Ch.J., in the opinion of this Court, was whether the affirmance of the judgment as to one of the Defendants, who were together adjudged to pay a sum of money in the original action, renders the Defendants liable as sureties upon the undertaking?

That question is very carefully and fully discussed by the learned Chief Judge. And as his views upon this point have never been reported, and are so conclusive upon the point under discussion, and received on that occasion the approval of this Court, it is not deemed inappropriate to quote them. Nothing further need be added upon the subject.

Judge Denio said: "The expressions of the undertaking, which provide for the case upon affirmance only in part, appear to have reference primarily to the amount, and not to the number of persons charged. The language is, that the Appellants, in the case of a partial affirmance, will pay the amount directed to be paid by the judgment, or *the part of such amount* as to which it shall be affirmed, if it be affirmed only in part. But independent of these words, I am still of opinion that this judgment has been affirmed, according to the general sense of the instrument.

"The decision that the Plaintiff is entitled to the amount of money adjudged to him by the Special Term, is sustained, and the position is upheld, that he is entitled to recover it in action. It was a case in which several damages might be given against one of the Defendants, though the other should be acquitted. This is established by a judgment, affirming the recovery as to Smith alone. The judgment of the Special Term has, therefore, been affirmed, with a variation, however, in this—that the recovery is to be satisfied by one, and not by both of the Defendants. It is not necessary to depart from the language of the instrument in order to charge the sureties. They are to abide according to the terms of their undertaking.

"There has been an affirmance of the judgment appealed from,

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and equitable construction cannot be resorted to for the purpose of charging sureties. But if the case is within the letter of their contract, they are liable, unless there is something in the spirit and intention of the instrument, or of the law under which it is given, which exonerates them. The object of the undertaking is to procure an absolute stay of execution, and of all proceedings on the judgment, and such is its effect (Code, §§ 335, 339).

"The motive for requiring the undertaking was to secure to the Plaintiff the fruits of the recovery, in case it should be determined that the allegations of error were unfounded. As the Plaintiff is, by the stay of execution, deprived of the immediate resort to the property of the judgment-debtor, which the law would otherwise give him, and as his title to the amount adjudged in his favor is primâ facie established, it was the policy of the law that he should have security to indemnify him against the possible contingency of the delay. The law assumes the judgment to be such presumptive evidence of his right, that it will not subject him to the hazard arising from the delay of further litigation, without an indemnity against any loss which he might thereby incur. If it should be decided, that in order to hold the sureties the judgment should be affirmed in all its parts, without variation or modification, the provisions for security would be illusory in a great variety of cases, which may be supposed.

"Let us take the case of an equity suit against two Defendants, and a judgment in a primary Court against one, and an acquittal of the other, and cross-appeals by the Plaintiff as to the discharge of the one acquitted, and by the Defendant, who was held liable; and that the Appellate Court should hold that both were liable, and give judgment accordingly. It is plain that the sureties of the Defendant, who was held liable by the first judgment, ought not to be discharged, for the complaint of that Defendant against the judgment would be shown to be unfounded, and the Plaintiff would have incurred the hazard against which the undertaking was intended to protect him; and yet it could not be said that the identical judgment appealed from had been affirmed in every particular. The system of the provisions respecting security on

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appeals is explained by the 366th section of the Code, as to judgments directing the assignment or delivery of documents or personal property. The undertaking in that case was to the effect, that the Appellant would obey the order of the Appellate Court, on the appeal. This shows the general intention of the Legislature, that the judgment of the primary Court should not be delayed in its execution, unless the party charged should give security to abide the judgment of the superior Court, if it should be adverse to him, without requiring that the same identical judgment should be sustained.

"The nature of the original action, and the liabilities upon which the recovery was had, are not stated in the present case. We may suppose them to have been what we know, by looking into the former case, they were—an alleged breach of duty on the part of Defendant Ogden, as member of the firm who were the agents of the Plaintiff for the sale of his land, in disposing of it in bad faith, and for a less price than it was worth, the Defendant Smith being the buyer, under such circumstances as would estop him of the defence of a bonâ fide purchaser. Both the Defendants were held liable for the supposed value of the land; and although the judgment was joint in form, each was made liable on account of his supposed individual misconduct, and not on account of the delinquency of the other. It was more like a judgment against two tort feasors than one against joint-debtors. In such cases the appeal is, in effect, several, by each Defendant; and it would have been perfectly correct for each Defendant to have brought a separate appeal, and to have given a separate undertaking, though it was not irregular for them to join in the appeal, and procure a single undertaking. But the proper construction of the instrument is, that the sureties undertake for each of the Defendants. The Defendant Smith was made liable for the value of the land, on account of having purchased it at a voidable sale, under circumstances which would not enable him to hold it against the Plaintiff's equity; and Ogden was held liable to the same amount for having sold the land to Smith, in violation of his duty; and the judgment contained a provision that Smith might

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satisfy the amount by reconveying such part of the land as he had not disposed of to others, and assigning and paying to the Plaintiff the securities and money which he had received for the part sold by him. Now, it might very well be that the judgment could be sustained against one, while the other should be acquitted, and such was, in fact, the judgment of this Court, which was in favor of Ogden, on the ground that he, being absent from the country, had no personal concern with the alleged illegal purchase from the Plaintiff. The appeal taken under such circumstances was, in effect, several by each Defendant, and the undertaking should be construed in connection with the judgment. Viewed in that light, the sureties must be considered as undertaking, in behalf of Smith, that if the judgment against him, from which he had appealed, be affirmed, he should pay the amount adjudged; and so of the Defendant Ogden. If the sureties were bound separately for each Defendant, in respect to the judgment against each, as, I think, they were, it is of no consequence that there was a reversal as to one of them. The terms of the contract adjust themselves to the case as it actually existed; and it is the same thing as though each had appeared separately, and the sureties had signed a separate undertaking upon each appeal. Though the nature of the action in the original suit, and the grounds of the judgment, were not found on that under review, neither was it shown that the judgment was one against joint-debtors; and the condition annexed to it, allowing Smith to discharge it by a collateral act, shows that it was not an ordinary judgment against two persons jointly indebted. I am therefore of opinion that the objection, that the judgment has not been wholly affirmed, or affirmed as to both Defendants, is not well taken."

These are the views of this Court, so clearly expressed in a case so analogous to the present, that they must be regarded as controlling and not open to further discussion. It is impossible to point out any essential difference between the case under review and that in which the preceding opinion was rendered. If ever a case was in quatuor pedibus with another, this is with that. To the same effect is the case of Potter *v.* Van Vranken (36 N. Y. 619).

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In the record now before us it distinctly appears that the original judgment was not against the Defendants therein as joint-debtors, but a judgment against them upon the separate liability and contract of each. It was against Nicholas Miller, as maker of the promissory note in suit, and against Leonard P. Miller as the endorser thereof; and, as was observed in Gardner *v.* Barney, it might very well be that, under such circumstances, the judgment might well be sustained against one Defendant, while the judgment against the other would not be allowed to stand.

Then the appeal, in effect, was in this case, as in that, a several appeal by each Defendant; and we are to construe the undertaking to refer to the character of the judgment it was given to secure. In that light we must hold that the sureties are to be regarded as undertaking, on behalf of Nicholas Miller, that if the judgment against him, from which he had appealed, should be affirmed, he would pay the amount of the judgment; and the same as to the other Defendant. Now, the judgment against the Defendant Nicholas Miller was affirmed by this Court, and upon such affirmance, the liability of his sureties to pay the judgment so affirmed became absolute. It was not impaired by the circumstance that this Court reversed the judgment of the Supreme Court against the other Defendant, Leonard P. Miller. It is not denied that if each Defendant had taken a separate appeal to this Court from the judgment against him, and an undertaking had been executed upon each appeal, that in case of the affirmance of the judgment upon either appeal, the sureties in respect thereto would have become fixed, although the judgment on the other appeal had been reversed. We held in Gardner *v.* Barney, that in a case like the present, it is the same thing as though each Defendant had appealed separately, and the sureties had signed a separate undertaking upon each appeal. That is decisive of the case at bar.

The findings of the referee, that the remittitur from this Court, containing the affirmance of the judgment, was filed in the Supreme Court by its order, is conclusive of the facts, and of the regularity of the Plaintiff's proceedings. We have no doubt

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of the power of the Supreme Court to direct the order to be entered, making the judgment of this Court the judgment of that Court, nunc pro tunc (Chautauqua County Bank v. White, 23 N. Y., 347).

The judgment appealed from should be affirmed, with costs.

Concurring, PORTER, PARKER, WRIGHT, and GROVER, JJ.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THOMAS J. WELLS, RESPONDENT, v. CHARLES KELSEY, APPELLANT.

Trover and Conversion—Evidence of Value—Plaintiff's Evidence of Cost—Rebuttal.

When the Plaintiff attempts to establish the value of property converted by his own mere opinion of value under oath, it is competent to show that at two sales of the property prior to the commencement of the action a much less value was attached to it.

It is also competent to show the value of other articles included in the bill of purchase, for the purpose of showing the estimated value of the property converted at the time of its purchase by the Plaintiff.

APPEAL from the Supreme Court. The action was to recover damages for the conversion by the Defendant of two boilers and a quantity of brick, with some other articles of minor value. These had been put in a building on Defendant's premises, in the summer of 1858, by his tenants, Durkee & Case, to be used by them in their business, which was the manufacture of soda, saleratus, and drugs. The building was destroyed by fire on the 30th day of August, 1860, which terminated the demise, under a provision embodied in the lease; and a question arose whether the articles thus introduced by the tenants belonged to the Plaintiff, to whom they sold them after the fire, or to the Defendant, who claimed them, in whole or in part, as fixtures annexed to his freehold.

On the trial, at the Kings Circuit, clear proof was made of the Plaintiff's title; and the practical issues came to be, as to the fact of conversion by the Defendant, and as to the actual value of the property. On both these questions there was a conflict of evidence; and the jury found adversely to the Defendant.

The only questions raised on the present appeal relate to the exclusion of evidence offered on the issue, as to the value of the property converted.

Those questions arose in this wise: the Plaintiff was sworn as a witness in his own behalf, and testified, among other things, that he bought the property in question on the 1st of Oct., 1860; that,

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in his own opinion, the two boilers, at the time of the alleged conversion, were worth as much as if they were new, and were of the value of $800; that the boiler-front was worth at least $50 more; that the boiler bolts were worth at least $40, and the brick at least $155; thus making an aggregate of $1,045, as the value of the property converted.

To weaken the force of this evidence, the Defendant, on his cross-examination, called for the production of his bill of sale. This evidence was excluded, and the Defendant excepted.

It afterwards appeared, by the testimony of Durkee & Case, that they had been some weeks endeavoring to sell the property, before they effected a sale to the Plaintiff; that the boiler had been two years in use by them before the fire; that the part of the building in which they were was not much injured by the fire, but was afterwards unoccupied; that the boilers were second-hand when they bought them, and that they were lying on a vacant lot at the time of the original purchase.

The Defendant, on the cross-examination of Durkee, interrogated him as to the price they paid for the boilers. The evidence was excluded, and the Defendant excepted.

He then introduced the testimony of several boiler manufacturers, tending to show that the boilers, when new, were not worth (to exceed) $550, and that in their condition, at the time of the alleged conversion, they were worth only from $160 to $350. At the time of the trial they were not in use, but were still lying on an unoccupied lot of the Defendant.

The jury found a verdict in favor of the Plaintiff for $751.44. Judgment was entered accordingly, and it was subsequently affirmed on appeal to the General Term in the Second District (15. Abbott, 53; 38 Barbour, 242).

Britton & Ely for Appellant.

A. N. Weller for Respondent.

PORTER, J.—The principal issue on the trial was as to the value of a pair of boilers, at the time of their conversion by the Defendant, which was three days after they were sold to the

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Plaintiff. They were second-hand boilers two years before, when they were bought by Durkee & Case, and they had been exposed to injury from disuse as well as from use.

The Plaintiff testified, as a witness in his own behalf, that their value was $800, and that they were worth as much as if they were new. This was competent evidence of value, but it was inconclusive in its nature. It was an estimate resting upon the opinion of a party subject to bias; and it related to second-hand articles, having no certain and definite market value. The statement carried with it no absolute assurance of verity; and, even if he made it in perfect good faith, the accuracy of his judgment might be open to question, in view of facts unknown to the jury, but within his personal cognizance. It was the right of cross-examining counsel to elicit these, if they were inharmonious with his evidence. They were at liberty to show that he bought the boilers three days before, on credit, at a fair and open sale, from parties who had used them, and knew their value, for half the sum at which he now assessed them. This seems to be conceded in the opinion delivered in the Court below; but it was held that a different rule prevailed where, as in this case, the inquiry involved the value of other articles included in the same sale. We do not think such a distinction well founded, nor do we find it recognized in the authorities. The objection, if it has any force, goes to the facility of proving the fact, and not to its admissibility as legal evidence.

The particular form of the transaction made it necessary to ascertain the relative value of the articles included in the bill of sale. If the Plaintiff had testified, in answer to the inquiry, that the other articles embraced in the $1,200 purchase were worth twice as much as the boilers, it would be a reasonable inference that his present valuation of the latter considerably exceeded their cost. It is true that the price which he paid for them would be indecisive as to their actual value; but it might well have a material bearing on the degree of weight to which his estimate of that value was entitled.

But even if this inquiry was properly disallowed, the Court

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erred in excluding proof of the price paid specifically for the boilers, on their purchase by the vendors of the Plaintiff. It is assumed, in the opinion delivered at the General Term, that if evidence of this kind had been offered it would have been admissible within the rule, and the fact disclosed in the printed case, that such proof was tendered and rejected on the trial, seems to have been overlooked. The authorities on this subject are decisive and uniform, and we think the rule they establish is sound in principle (Campbell v. Woodworth, 20 New York, 499; Dixon v. Buck, 42 Barbour, 70; Crounse v. Fitch, 23 Howard, 350; Suydam v. Jenkins, 3 Sandf. 628).

While the law admits the opinions of those competent to judge the application in this, as in other cases, of the usual tests of truth, on the cross-examination of the witness it is legitimate to ascertain his means of knowledge, to scrutinize the grounds of his judgment, and to elicit such specific facts as may aid in applying and weighing the evidence. Such facts are often at variance with the opinions expressed by the witness, which, from the nature of the case, are usually founded on data unknown to the Court. On questions of value there is generally room for wide diversity of judgment; and when estimates are loosely made, they should be subject to all reasonable scrutiny. In this instance the inquiries were within the range of fair and legitimate cross-examination, and we think they should have been allowed by the Court. A knowledge of the prices actually paid for the boilers on two business sales, both ante litem motam, might well aid the jury in weighing the conflicting estimates, and in reaching an intelligent and just conclusion.

The judgment should be reversed, and a new trial should be ordered.

All the Judges concurring except HUNT and GROVER, who took no part.

Judgment reversed, and a new trial ordered.

JOEL TIFFANY,
State Reporter.

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JOHN W. BATES, RESPONDENT, v. ENOCH H. ROSEKRANS, APPELLANT.

Promissory Note—Payment—New Note—Pleading—Answer—Counter-claim.

The giving of a new note by one of two joint and several makers, intended as a provison for the payment of their former note, not agreed to be taken as payment and not in fact paid, constitutes no defence to an action upon the original note.

THIS action was brought upon a joint and several promissory note, dated September 11th, 1851, for the payment of $2,553.71, made by the Defendant and one Andrew Bigham to the order of, and endorsed by, Bates & Griffin.

On the trial, the Defendant's counsel made a motion for judgment upon the pleadings, upon the ground that the Plaintiff had not replied to the counter-claims of the Defendant contained in the answer.

The Court overruled the motion, and the Defendant's counsel excepted. The Plaintiff's counsel then read in evidence the note above described, and found the amount of interest due upon the same.

The Defendant's counsel then read in evidence a former complaint in the action, verified by the Plaintiff, in which it was alleged that, after the making, and before the maturity of the note sued upon, "the Defendant, in consideration of his indebtedness upon said note, and to provide for the payment of the principal of the same, made and delivered to the Plaintiff another promissory note, dated," &c.; that neither of said notes was paid, and that the Plaintiff was the owner of both of them.

The Plaintiff's counsel then produced and cancelled the note last mentioned.

The Defendant's counsel insisted that the defence of payment was established by the evidence thus introduced, and requested the Court so to instruct the jury, and requested to go to

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the jury on that question. The Court declined each of these requests, and the Defendant's counsel excepted.

The Court directed a verdict for the Plaintiff for the amount of the note.

The General Term affirmed the judgment entered upon the verdict, and the Defendant now brings his appeal to this Court.

Beach & Smith for Appellant.
Gale & Alden for Respondent.

HUNT, J.—The facts recited in the amended pleading introduced in evidence did not establish a payment.

Before the maturity of the original note, "and to provide for the payment of the same," one of the joint and several makers thereof delivers to the holder his own note payable to the same parties in the original note named. Providing for the payment of a note, and the actual payment thereof, are quite different things. In the case in hand, the same evidence that showed a provision for payment, showed also that no payment was in fact made. As often occurs in commercial transactions, the provision failed.

That the giving of the new note, by one of two joint and several makers, intended as a provision for the payment of a former note, not agreed to be taken in payment, and not in fact paid, constitutes no defence to an action upon the original note, is well settled. The principle is quite familiar, and of frequent occurrence (Highland Bank *v.* Dubois, 5 Denio, 558; Cole *v.* Sackett, 1 Hill, 516; Smith *v.* Rogers, 17 John. R. 340).

The Defendant insisted at the trial, and his counsel now argue, that he was entitled to judgment at the Circuit, on the ground that the Plaintiff had not replied to the counter-claims contained in his answer.

The fifth answer contains the statements that are the most strenuously insisted upon as constituting a counter-claim, and an examination of that will suffice for the whole. The Defendant therein alleges, "for a further defence," that the note in the complaint described arose out of partnership transactions of which the

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Defendant and one Bigham were members, and was given for the benefit of the partnership, which facts are known to the Plaintiff; and afterward Bigham transferred all his interest in the partnership property to the Plaintiff, who was then the holder of the note, and in consideration thereof the Plaintiff agreed with Bigham to pay his share of the debts of the partnership, and any balance due from him to the partnership, and to cancel the note; that Bigham's share of the debts amounted to more than the note; that Bigham owed the partnership a balance greater than the amount of the note, and the Plaintiff has received and holds under the assignment, property of more value than the amount of the note; and that he has not paid any part of the partnership debts, and refuses to apply the partnership property to the payment of said debts.

The Defendant does not pretend that he was precluded from making proof of the allegations contained in this answer, and thus establishing the equitable defence arising from the statements therein contained. He insists that by the rules of pleading in existence at the time of the trial, a "counter-claim" was to be taken as true, unless it was formally denied by the Plaintiff, and that no denial having been made in the present case, he was of right entitled to a judgment upon the pleadings.

The Court below held the pleading to be an answer, and not a technical counter-claim, and overruled his demand for judgment.

This decision was right, for several reasons.

The first ground is, that the answer states no claim "existing in favor of the Defendant against the Plaintiff."

The Code is express, that the claim "must be one existing in favor of a Defendant and against a Plaintiff" (Code, § 150; Vassear v. Livingston, 3 Kern. 248). The claim, as stated in the pleading, is in favor of Bigham, or of his representatives, if he is dead, and not of the Defendant. It was Bigham, and not the Defendant, who transferred the property to the Plaintiff. It was to Bigham, and not to the Defendant, that the Plaintiff made the promise to pay the partnership debts, and to cancel the note. It was to Bigham, and not to the Defendant, that he was bound to account for

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the property, or its proceeds, if he failed to make a proper application of it. A perfect cause of action exists in favor of Bigham, if the statements of the answer are true, possibly also in favor of the holder of the note, or a creditor of the former, but none in favor of the Defendant himself, one of the debtors in the transaction (Beardsly Scythe Co. *v.* Foster, decided June Term, 1867). While it is unnecessary to decide whether these circumstances would afford an equitable defence to this action, it is clear that they do not avail the Defendant in the technical aspect in which he here seeks to defeat the Plaintiff's right of recovery.

I think the answer given by the Court below is also a sound one, to wit: that the pleading does not purport to be a counter-claim. It designates itself as "a further defence" simply, and there rests. No particular form of words is necessary to make a pleading a counter-claim; and if the party had, in any reasonable language, intimated that he intended to make a personal claim in his own favor against the Plaintiff, it would have been sufficient.

The ordinary and most satisfactory form of giving that intimation is by a statement that the pleading is a counter-claim, or by a prayer for relief. The present pleading, however, contains no words that could have justified the Plaintiff in supposing that any personal judgment was sought against him, and in preparing for that emergency.

Judgment should be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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JOHN T. LEE AND GEORGE C. HALL, RESPONDENTS, v. ARUNAH M. ADSIT AND ENOCH H. ROSEKRANS, APPELLANTS.

Consignment—Insurance by Consignee—Ratification by Consignor—Principal and Agent—Non-liability to Insure.

A consignee or agent for sale is not bound to insure for his principal unless expressly instructed so to do, or unless it is so understood between them.

A contract made for the benefit of the principal, but without his knowledge or consent, may be ratified and adopted by him, whether made in his name or in the name of the agent, whenever brought to his knowledge. The rule is, that a subsequent ratification is equivalent to an original authority.

The contract of insurance is a contract of indemnity, and its real subject is the interest of the person insured in the res; and the terms of insurance, however broad and comprehensive, must be restricted to those interests which the insurance was actually intended to cover.

THE Defendants appeal from an order of the General Term, reversing the judgment of the Court below, and granting a new trial.

The action was commenced December 12, 1857. In their complaint, the Plaintiffs aver that, in 1856, they received lumber at their lumber-yard from Defendants, for sale, on commission of 8 per cent. for sale and guaranty. Plaintiffs were not to insure the lumber, but Defendants took the risk of fire. Plaintiffs advanced freight on the lumber, and money to Defendants, and sold part of the lumber, and the balance was destroyed by fire.

Plaintiffs accounted to Defendants concerning their sales, and claimed for balance of advances over sales, and for reasonable pay for their care of the lumber until it was burned.

In their answer the Defendants deny any express agreement that Plaintiffs were not to insure the lumber, or that Defendants took the risk of fire. They deny certain items of advances and sales, and they deny an accounting.

They admit and aver a consignment of lumber, under agreement that Plaintiffs would make advances, and sell the lumber, on

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a commission of 8 per cent. for sale and guaranty, and that such was the entire agreement between the parties. They aver that, in previous years, Plaintiffs, as factors, without Defendants' knowledge, insured in their own names lumber consigned to them, including Defendants' lumber then held by them on commission; that the portion of insurance premiums chargeable to Defendants' lumber was not more than one-half of one per cent.; that the Plaintiffs concealed that fact, and charged Defendants a greater rate as and for insurances by Plaintiffs, as insurers, and not as and for expenses of insurance by them as factors; that, in 1856, Defendants declined to submit to any charge for insurance by Plaintiffs personally, as insurers, but did not forbid Plaintiffs from insuring, as factors, Defendants' lumber.

Defendants also aver that, in 1856, Plaintiffs, as Defendants' agents and consignees, without express directions from Defendants, insured, in various companies, the consigned lumber in their yard; that those policies were in force when Defendants' lumber was burned, and covered the same; that Defendants, until the fire, were ignorant of such insurances, but then learned thereof, and at once, and before Plaintiffs had made proofs of their loss, ratified and adopted those insurances, and claimed a share therein; that Plaintiffs afterwards received on such insurances their full amount, and an amount exceeding Plaintiffs' advances and charges on Defendants' lumber, and including Defendants' interest therein as owners. Defendants also pleaded payment. A reply was waived.

The cause was tried before Hon. A. C. Paige, as sole referee.

On the trial, the following of the more material facts were either admitted or proved, and were found by the referee:

Between January 1, 1856, and August 1, 1856, Plaintiffs advanced to Defendants $3,000, under an agreement that Defendants would forward lumber to Plaintiffs, to sell on commission; Defendants to repay said advances and Plaintiffs' charges for transportation thereon, and Plaintiffs' commissions; and that the lumber mentioned in the complaint was forwarded and received under that arrangement. Between June 23 and August 6, 1856,

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Plaintiffs received the lumber in question, and paid for transportation and inspection thereof $2,630.38. Between February 1 and November 24, 1856, Plaintiffs made sales of said lumber to the amount of $5,099.57, upon a credit of three months.

On January 1, 1857, the interest on the advances and payments exceeded the interest on said sales by the sum of $64.70.

Plaintiffs' commissions for sale and guaranty of the lumber so sold amount, at 8 per cent., to $407.96. The unsold residue of the lumber consigned by Defendants was destroyed by fire, August 2, 1856. The reasonable value of Plaintiffs' expenses and services in regard to said lumber, until it was burnt, was $152.90; but that would have been included in and covered by Plaintiffs' commissions, in case the same had been sold. About January 1, 1857, an account of the foregoing amounts, claiming a balance of $1,156.37, with a statement of the loss of the residue of the lumber, was rendered by Plaintiffs to Defendants, which account was promptly disputed by the Defendants. The Plaintiffs held, at the time of the fire, policies of insurance to the aggregate amount of $30,000, then in force, whereby the insurers "do insure Lee & Hall against loss or damage by fire on lumber—their own, or held by them in trust, or on commission, or sold, but not delivered, contained on lots numbers," &c., &c.—the premises in question.

Each of these policies contained the condition that "property held in trust, or on commission, must be insured as such, otherwise the policy will not cover such property."

At the time of the fire there was lumber on the yard, held on commission by Plaintiffs, exclusive of that of Defendants' and another firm, to the amount in value of $30,660.96, the damage to which was $30,387.60. The loss of Defendants' lumber was $5,165.81, and that of the other firm was $4,095.40. These two lots of lumber are conceded, for the purpose of this action, to have been held by the Plaintiffs in the same character and on the same terms. Plaintiffs received from the various companies, in full, as allowed for the loss, after charges and expenses, $29,407.95, October 15, 1856, and paid all that sum to consignors, exclusive of the Defendants' and the other firm mentioned, and none of the per-

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sons thus paid received more than the actual amount of their loss.

In the settlements preceding these payments, the Plaintiffs charged the consignors each a regular commission on sales and guaranty, and also a commission of one per cent. for insurance, except in one case, where a commission for insurance of one-half of one per cent. only was charged.

Plaintiffs never communicated to Defendants that such policies had been obtained, and the latter had no knowledge of their existence until after the fire had occurred. On the 5th of August, 1856, three days after the fire, the Defendants wrote and sent to the Plaintiffs a letter, stating that they, the Defendants, "ratify, approve, and adopt the various insurances effected by you on the lumber in your lumber-yard," &c., &c., "and also ratify, approve, and adopt the various policies of insurance obtained and held by you upon said lumber," &c.; also expressing their willingness to pay their share of the expense out of benefits to be realized from the insurances.

They further insist upon the Plaintiffs enforcing a claim, on their behalf, for the lumber lost by them, against the insurance companies, and give notice that, unless such claim be enforced, they will hold the Plaintiffs personally responsible for the value of the lumber destroyed, or their ratable proportion of the whole insurance to the whole value of the property destroyed.

The Plaintiffs then proved that, during the summer of 1856, and at intervals of ten to fifteen days, Plaintiffs took inventories of the quantity and value of the lumber on their yard, which they had agreed to insure for consignors, and did not, in such inventories, embrace the lumber of the Defendants; and this evidence was afterwards, by the referee, declared to be inadmissible.

The Plaintiffs proved, also, that it was their practice to have their insurance policies equal in amount, as nearly as practicable, to the value of the lumber which they had agreed with the consignors thereof to insure.

Also, that Defendants' lumber was piled on Plaintiffs' yard, in separate piles, which were interspersed with, but distinguishable from other piles of lumber; and that in taking said inventories,

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account was taken of the lumber which Plaintiffs had agreed to insure, but that the piles of Defendants' lumber were passed by, and not entered on said inventories.

That one of said inventories was made about June 23, 1856; that its amount exceeded Plaintiffs' policies then in force, by about $10,000; and that lumber was then being received on Plaintiffs' yard faster than it was being sold.

The foregoing testimony was afterwards excluded by the referee. The Plaintiffs also testified, that, in regard to the insurance, they did not intend to act in any respect for the Defendants, and that in determining, from time to time, the amount to get insured, they did not include any lumber of Defendants, or any amount advanced to them. This testimony was afterwards stricken out, under the Defendants' objection.

It further appeared on the trial, that, in the years 1853, 1854, and 1855, Plaintiffs received lumber from Defendants, and sold the same on commission. Yearly accounts of these transactions were rendered and settled in accordance therewith, usually about the 1st of January. In 1853 Plaintiffs charged, and Defendants paid 1½ per cent. for insurance.

In 1854, and before the business of that year commenced, Plaintiff Lee and Defendant Adsit conversed about the business of that year, and Adsit refused to pay 1½ per cent. for insurance, on the ground that it was too much. From that time neither of the Plaintiffs ever intimated that they would do Defendants' insurance for less than 1½ per cent.

Defendants, from that time, never proposed to pay Plaintiffs 1½ per cent. for insurance, nor did they agree to pay that rate, nor did Defendants, after 1853, ever propose to Plaintiffs to pay them anything for insurance, except that in an interview between Adsit and Lee, in 1856, before the business season, and in relation thereto, Adsit expressed a willingness to pay 1 per cent., but Lee charged 1½ per cent., which Adsit refused to pay. In the years 1854 and 1855, no charge was made by Plaintiffs for insurance, and nothing was paid to them therefor.

In the winter of 1855–6, Defendant Adsit, when speaking of

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lumber sent by Defendants to Plaintiffs, stated to Theodore Clark, that Defendants did not get insured, but ran their own risk, and stated, also, to Joseph H. Sandford, that Defendants insured the same themselves.

The referee decided that the Defendants were entitled to recover against the Plaintiffs for the value of their lumber destroyed on the yard of the Plaintiffs, less the advances and expenses against the same, which he placed at the sum of $3,216.30.

On May 20, 1860, judgment was entered, on the report of the referee, in favor of Defendants against the Plaintiffs, for damages and costs, $3,462.93.

From this judgment the Plaintiffs appealed to the General Term of the Supreme Court, which, in March, 1862, reversed the same, and granted a new trial, with costs to abide the event; and from this order of reversal the Defendants appeal to this Court.

FULLERTON, J.—Lee & Hall, the Plaintiffs, were lumber commission merchants, and for several years prior to August 2, 1856, were in the habit of receiving from Adsit & Co., the Defendants, consignments of lumber for sale. On that day, lumber of the Defendants, to the value of about $5,000, remaining unsold in the Plaintiffs' yard, was destroyed by an accidental fire. This action was brought to recover a balance of account for charges and advances over and above the proceeds of the lumber sold.

The Plaintiffs' demand is not questioned, and the whole controversy grows out of the Defendants' claim on account of their loss by the fire.

A referee allowed this claim, and judgment was entered on his report against the Plaintiffs, for $3,216.30, with interest and costs. Exceptions were taken, and, on the Plaintiffs' appeal, a General Term, sitting in the Third District, reversed the judgment and granted a new trial. The Defendants appealed to this Court, consenting that, in case of affirmance, judgment absolute be rendered against them.

The complaint alleges that it was expressly agreed that "the Plaintiffs were not required to effect any insurance against fire,

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and that, so far as concerned the Plaintiffs, the Defendants should take the risk."

The answer contains two separate defences. The first defence echoes, in its precise words, a denial of this alleged *express* agreement, but it contains no claim on account of the loss. That claim is set up in the second defence, which recites what it alleges to be "the entire agreement."

As stated, this agreement consists of ordinary stipulations between a consignor and consignee on other matters, but without any which could be construed as referring to insurance, and without any allusion whatever to that subject, except a statement that the agreed 8 per cent. commission to the Plaintiffs was to be in full for sales, guaranty, and all charges connected with receiving, piling, storing, and sale, "not including charges for insurance."

The defence does not allege instructions to insure, but avers that the Defendants "never did at any time, or in any manner, forbid or prohibit the Plaintiffs from proceeding and effecting, as such factors as aforesaid, for the security and benefit of the Defendants, an insurance, or insurances, on the lumber." Except in the somewhat indirect and incidental way hereafter particularly stated, the defence does not intimate that there was any duty to insure; and except by reason of the insurance actually effected by the Plaintiffs, it does not make any claim against them.

The precise ground of Defendants' claim is thus stated: Prior to January 1, 1856, the Plaintiffs, without the Defendants' knowledge, constantly kept on foot insurances, effected in their own names, upon all lumber held by them in trust, or on commission. The expenses of such insurances assignable to Defendants' lumber did not exceed one-half of one per cent. on the sales thereof; the Plaintiffs, concealing their said insurances, and the cost thereof, fraudulently, with intent to extort, &c., charged the Defendants from time to time, as upon insurance by the Plaintiffs personally, and not as and for the expense of procuring insurance, a larger sum than such actual cost; and prior to January, 1856, the Defendants protested against such charges, and refused to pay such per centage thereafter.

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The defence then alleges that in 1856, prior to the loss in question, but without express directions, the Plaintiffs, as they lawfully might, and as they were bound to do, in the proper and faithful discharge of their duty to the Defendants, as factors and consignees, "did procure and effect insurances upon lumber held by the said Plaintiffs in trust or on commission."

It further alleges that these insurances covered the Defendants' interest; that on learning of their existence, after the loss, the Defendants notified the Plaintiffs that they adopted and ratified the same, as having been effected for their benefit, and that afterward the Plaintiffs recovered the whole amount insured.

The following facts appeared on the trial: At the time of the fire the Plaintiffs held policies amounting, in the aggregate, to $30,000, by the terms of which the insurers "do insure Lee & Hall against loss or damage by fire on lumber—their own, or held by them in trust, or on commission, or sold, but not delivered, contained in their lumber-yard." The policies required the insured to furnish a statement, and an affidavit, of the interest of the assured therein; and they also contained a printed clause, in these words: "Property held in trust, or on commission, must be insured as such, otherwise the policy will not cover such property; and in case of loss, the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein."

There was in the Plaintiffs' yard at the time of the fire, and destroyed thereby, not only the Defendants' lumber, and about $4,000 worth of lumber belonging to James Morgan & Co., held on the same terms, but also $30,000 worth of lumber held on commission from other consignors, for whom the Plaintiffs had agreed to insure, at specified rates.

The Plaintiffs included in their claim upon the insurers the lumber of this latter class, received substantially the whole amount insured, and paid it over to their consignors.

But they made no claim upon the insurers for the property of the Defendants, or of James Morgan & Co.

For the business of 1853, the Plaintiffs charged and received

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from the Defendants, one and one-half per cent. on account of insurance.

Then, and before the business of 1854 commenced, the Defendants refused to pay one and one-half per cent. for insurance, on the ground that it was too much. At the close of the years 1854 and 1855, accounts were settled between the parties, no charge being made for insurance in either instance. At an interview between the Defendant Adsit and the Plaintiff Lee, in 1856, before the business season commenced, Adsit expressed a willingness to pay one per cent. for insurance, but Lee charged one and a half per cent., which Adsit refused to pay. In the winter of 1855–6, Adsit stated to two persons, that the Defendants did not get their lumber insured, but ran their own risk, or insured themselves.

The Defendants had no knowledge of the insurances in question until three days after the fire. They then gave the notice of adoption and ratification alleged in the answer. The Plaintiffs paid no attention to this notice.

The Defendants' lumber, being piled separately, was not included in the inventories taken by the Plaintiffs, at intervals of ten or fifteen days, during 1856, for the purpose of keeping their insurances full. Each of the Plaintiffs testified that he did not intend to insure the Defendants' lumber.

The referee decided that the Plaintiffs were not required by law to insure, or to obtain insurance on the Defendants' lumber, but that the Defendants' lumber was embraced within the terms of the description of the subject insured, contained in the policies, and that no parol evidence was admissible to vary or contradict the same. Most, if not all, the facts which have any tendency to show that the insurances were not designed to cover the Defendants' interest, were proved under objection, and were ultimately excluded and disregarded by the referee, as inadmissible. This was on the ground that the terms, or legal meaning of the policies, could not be contradicted or varied by such evidence.

The referee found that the Defendants had no notice of the insurances having been effected; but nothing in his findings, or in

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the evidence, gives the least color for any imputation on the motives or good faith of the Plaintiffs.

The case involves nothing but pure questions of law.

I proceed to examine these questions:

1. Rightly understood, the answer does not allege that the Plaintiffs were bound to insure the Defendants' lumber, or to procure any insurance thereon. Its only reference to a duty in that respect is merely incidental, and by way of an argument in support of the Defendants' alleged right to adopt the insurances which were actually effected.

No fact is found having any tendency to establish such a duty, and the express finding of the referee, that it did not exist, does not appear to have been objected to.

Not only was there no affirmative proof, but the negative was shown. There was no conflict, and the evidence given, if legally admissible, showed a perfect understanding between the parties, that the Plaintiffs were not bound to insure, or procure insurance, for the Defendants, and were not to receive any compensation for so doing.

The terms of the second defence, and of the notice of adoption given by the Defendants after the loss, alike imply a concession, that in this act of subsequent adoption lay all the Defendants' claim to indemnity. If necessary, it may be added that, according to the whole current of authorities, an agent for sale is not bound to insure for his principal, unless expressly instructed so to do; or an understanding to that effect between him and his principal can be implied from circumstances (Story on Agency, § 111).

2. That a contract made for his benefit, but without his consent or knowledge, may be ratified and adopted by a principal, whether made in the agent's name or in his own, may be assumed.

Perhaps, if made by a total stranger, or by a special or general agent, contrary to an express prohibition, the contract might still be subsequently adopted. Nay, if a principal, desiring to curb an officiously disposed agent, should exact from him a bond to abstain from any such action, it may be that, in case his interest

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should dictate, he might elect to adopt a contract perversely made for his benefit by the agent, despite of all his precautions to prevent it.

The rule that a subsequent ratification is equivalent to an original authority, and has a retroactive energy, is highly beneficial. I shall not attempt to define its extent, or the boundaries by which its influence may be limited (17 Penn. R. 298).

If, upon all the admissible evidence in this case, it could be adjudged that the insurances in question were made for the Defendants, for their benefit, or to cover their interest in their lumber, then it may be assumed that they had the right of adoption to the whole extent claimed.

3. Contracts made by an agent in his own name, for the benefit of his principal, or in his principal's business, may generally be enforced by and against his principal. And the action on such contracts may be brought by or against the agent, or by or against the principal (Story on Agency, § 161; Dykers v. Townsend, 24 New York R. 57).

The contract of insurance is not regarded as a wager, irrespective of interest, that the res shall not be destroyed or injured by the peril insured against.

It is a contract for indemnity; and its real subject is the interest of the person insured in the res. The reason of this is obvious. The res is constantly under the control of the insured, and the risk may be diminished in proportion to his vigilance and good faith, and enhanced if he be careless or dishonest.

It is of the utmost importance to insurers to know the person whom they insure; and therefore policies of insurance, in the ordinary form, are not within the general principle that an agent may take a contract in his own name for the use and benefit of his principal. The ordinary policy covers no interest save that of the party named as the assured.

But it often happens that insurers are content to insure whomsoever it may concern, relying upon the character of the person to whom the insurance is granted as a sufficient warranty of the fairness of his principals; or, without any such prudential reflec-

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tions, they may choose to take the risk. When this is the case, the policy is framed accordingly.

For this class of cases various formulæ have been adopted.

Sometimes the applicant is insured as "agent." Sometimes the insurance is for "owners," or "for whom it may concern."

In all these cases it is well settled, that in prosecuting a claim against the insurers extrinsic evidence may be, and *must* be resorted to, for the purpose of ascertaining the interests intended to be covered; and, as the insurers are not always possessed of any information themselves, the intent of the agent in effecting the insurance, or of the person under whose instructions he acted, is oftentimes the only guide. Mr. Duer, in his 9th Lecture (§ 22), lays down the doctrine as follows: "The terms used, however broad and comprehensive, must also be restricted to those for whom the insurance was in fact intended, *and* by whom it was previously directed or authorized, or subsequently, in due season, adopted. All other persons, although they may equally fall within the description in the policy, are not parties, but strangers to the contract. An insurance on goods, on account of whom it may concern, is capable of being applied to the interest of every person who is proved to have shipped goods in the vessel, and on the voyage described; but where an action is brought on the policy, it is not sufficient to show that the person in whom the interest is averred was the owner of goods to which the insurance might extend. To warrant a recovery in his behalf it must be shown that he was a party to the contract, *by evidence* of the additional facts that I have stated" (2 Duer on In. p. 30).

In the same lecture he says:

"It is needless to cite authorities to show that in England, as in the United States, the general words of the policy are restricted to those for whom the insurance was intended; the benefit of the contract, notwithstanding the generality of its terms, is limited to those on whose behalf it was in reality effected; that is, for whom the insurance was intended" (id. pp. 33, 34).

Further on, at p. 37, he states that the intent of the agent to insure his principal may be inferred from certain circumstances,

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without direct affirmative proof, and carefully adds: "But where the proof establishes that his [i. e., the principal's] interest was not intended to be covered, it forms an insuperable bar to a recovery. Its necessary legal effect is to exclude him from all privity in the contract."

Phillips on Ins. (3d ed. p. 213, § 383) states this to be the law, with equal precision, but with much more brevity:

"A policy made in the name of a particular person, 'for whom it may concern,' or with any other equivalent clause, will be applied to the interest of the party or parties, and *only* the party or parties, *for whom it is intended by the party who effects it*, if such party has authorized its being made beforehand, or subsequently adopts it."

These positions are fully sustained by the authorities, and indeed are quite familiar; yet it appears from his opinion that the learned referee in this case was governed, in some degree at least, by a supposal that, in another part of their works, these same writers had laid down an opposite rule.

The extent to which, in this class of cases, resort may be had even to a mere emotion of mind on the part of the agent or person effecting the insurance, is well exemplified by Mr. Phillips (§§ 384 and 385).

The policy now in very common use, by which an agent is insured against property "his own, or held by him in trust, or on commission," was devised to enable a factor or commission merchant to keep insured as far as occasion might require, and without inconveniently numerous applications to the insurers, a stock that was not only fluctuating as to articles, but as to owners.

These policies are not expressed to be for the benefit of any other person than the party in whose name the insurance is effected, nor do their terms necessarily imply such a purpose.

In this respect they differ from all the other forms in use.

Property held "on commission" is almost invariably subject to a lien in favor of the holder, for charges or advances, or both. This gives him an insurable interest, which of itself might be deemed to satisfy the terms of the policy.

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As much or more to the same purpose might be said in reference to the term "in trust." Hence arose a doubt whether these policies could be construed as applicable to the interest of a consignor.

Judge Oakley, in De Forest v. The Fulton Fire Insurance Company (1 Hall, 135), furnishes an apt solution of the doubt, by suggesting that these words are equivalent to the clause "for whom it may concern."

The decision in that case may be thought to partake of a liberality more conspicuous in modern times than formerly.

It certainly gives an effect to the policy beyond the precise letter, and beyond what might seem its mere import. But there had grown up a general practice of using this form to cover all interests in the specified articles which the commission merchant desired to cover; it may have been right to give it a judicial sanction; and, at any rate, the point is now at rest. But it never has been held by any Court, or law writer, that, per se, these words absolutely, and to the exclusion of all explanatory extrinsic proof, cover the interest of all persons holding the relation of consignors to articles in the designated place, of the description specified and held on commission by the person taking out the policy.

The Defendants' claim rests on the hypothesis that such is their legal effect, and that extrinsic evidence is not admissible to show that the consignee who obtains such a policy was not bound to procure insurance for a particular consignor, and did not intend to cover such consignor's interest.

In this case the consignees lost no property of their own; they held on commission $30,000 worth of property which they had engaged to insure, and about $10,000 worth which they were not bound to insure. If the consignees had been insolvent, and refused to enforce the policies, the consignors would have been obliged to sue the insurers.

They must all have been parties to the action, either as Plaintiffs or Defendants. If they were very numerous, one might bring the action as well for himself as for all others in interest; but this would only have been a variance in form. In such cases,

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before a final disposition can be made, every party in interest must be brought in before a master or referee, or by his default, after notice, be forever precluded from any claim on the fund.

The rules concerning parties would require this, in order to protect the insurers from many accountings and repeated actions.

If it could be thought that each consignor could bring a separate action, the insurers could still accomplish the same result by a cross-action of interpleader. The moment the liability of the insurers in such an action, to the extent of $30,000, was determined, their interest in the controversy would cease, and a question as to the distribution would arise between the other parties —i. e., the consignors.

The insurers, having no concern in it, could take no part in this controversy. How, let us inquire, would the fund be distributed?

The Defendants claim to be paid in full; and they recovered before the referee on that basis. They certainly could not recover to that extent in a controversy between them and the other consignors. Nor do I conceive that, in such a controversy, the Defendants, or Morgan & Co., could recover any portion of the fund.

Evidently, the other class of consignors would be entitled to the whole. Perhaps it might be suggested that the Defendants would be content to share pro rata.

The unreasonableness and injustice of such a claim might be made more striking, though not more clear, by altering the figures so as to present a supposed parallel to this case. Let it be supposed that the stock destroyed by the fire was worth $100,000; that nine parts of it belonged to the Defendants and Morgan & Co., and one part to the other class of consignors, for whom the Plaintiffs were bound to insure, and that insurance had been effected only to $10,000.

Even in the mitigated form last suggested, the Defendants' claim, if sustainable, would cut down to a ten per cent. dividend the consignors who, upon every principle of justice and fair dealing, were entitled to full indemnity.

A method of applying the principles of law which necessarily

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leads to such results cannot be correct; and it only remains to show precisely wherein the Defendants' error consists.

In the first place, the policy does not describe the *interest* insured; nor is it necessarily to be understood as including absolutely *all* interests in *all* lumber held by the Plaintiffs, upon any sort of trust, or under any possible form of commission. For instance, the consignors interested in lumber which has been consigned with a positive prohibition against effecting any such insurance, would not be included (6 Duer's Rep. 70). And if extrinsic evidence can be given to exclude from the insurance any class of consignors, the alleged rule fails. It is only by force of a very liberal implication in favor of an intent, not expressed in the policy, that the interest of any consignor is let in and protected. And it would be strange indeed if that concession could be so intensified as to force upon the general words of the policy an inclusion of all consignors who, after the disaster, might choose to come in and strip of their indemnity the consignors who bargained for it in advance, and paid the premium accordingly.

But, in the next place, the referee admits that, if extrinsic evidence be admissible, the Defendants must fail; and by the authorities it clearly appears that, in all these cases of general insurance intended to cover the interest of principals not named, extrinsic evidence that the claimant was within the intent is not only admissible, but actually indispensable to a recovery against the insurers, though, like other facts, it does not require direct proof, but may be inferred from circumstances. Catlett *v.* Pacific Ins. Co. (1 Wend. 575) is a direct authority for the admission of such evidence, even in an action against the insurers on the policy. In that case an insurance was effected by an agent "on account of *the* owners." There were, in fact, three owners. Two of them sued upon the policy, and the nonjoinder of the third was set up as a defence. Precisely as Judge Oakley held in reference to the clause now in question (1 Hall, 135), the Supreme Court held that the phrase, "for account of the owners," was equivalent to saying "for whom it may concern;" and accordingly, parol extrinsic evidence was received to show the intent of those who in-

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structed the agent to obtain the policy. On error, Chancellor Walworth approved this decision, and the judgment was affirmed (S. C. 4 Wend. 79, point 1). "*The* owners," by force of the definite article, meant, primâ facie, *all* the owners; yet that did not avail to exclude the evidence of intent.

Here, the policies did not refer to "*the* consignors" as intended to be insured, and they can only embrace the interest of any consignor by a free construction as to a presumed intent; yet, if they had so referred to "*the* consignors," Catlett *v.* The Pacific Ins. Co. would authorize the admission of extrinsic evidence that, as to *some* consignors, it was not intended to include their interest. That case is a conclusive authority on this point.

If the printed clause above recited from the policies in question be deemed to obviate the ambiguity of the written words, and so make them read as insurances "on account of Lee & Hall, and their consignors," that circumstance would only render more precise and perfect the parallel between the question under consideration and the decision in Catlett *v.* The Pacific Ins. Co. That case would then stand as authority in point for the admission of extrinsic evidence that *some* consignors were not covered.

I consider it quite clear, therefore, that even in an action on the policies against the insurers, parol extrinsic evidence would be admissible to show that the Plaintiffs were not bound to insure, nor were instructed to insure, and did not intend to insure, the Defendants' interest; and I conceive that such evidence would exempt the insurers from any claim on that account.

But it is entirely unnecessary to decide either of those questions.

The insurers had no interest in either; they were bound, at any rate, to the whole extent of their policies. There is another view of the case which is more in point, and is decisive.

4. This is not an action against the insurers, or upon the policies. The rule that parol extrinsic evidence shall not be received to contradict or vary a contract which is in writing, applies only in controversies between the parties promisor and promisee in such contract. It is founded upon the just and rational pre-

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sumption that the parties have made all the stipulations for the protection of their respective interests on which they were agreed, and have, in language chosen by themselves, placed such stipulations in a more certain form than mere oral discourse, for the purpose of excluding all such loose and uncertain media of proof. The writing is not conclusive as between one of the contracting parties and a third person. This doctrine is asserted, in general terms, in a multitude of authorities; but, in many instances, it is accompanied by remarks from which it might be contended that the privilege of explaining the written document was not accorded to him who was a party to it, but only to his adversary (1 Greenleaf's Ev. § 279; New Berlin *v.* Norwich, 10 John. 230; Evans *v.* Wells, 22 Wend. 345). But it is not so confined. According to Co. Lit. (352 *a*), "Every estoppel ought to be reciprocal—that is, to bind both parties; and this is the reason, that regularly a stranger shall neither take advantage of, nor be bound by the estoppel." To this effect see Gaunt *v.* Wainman (3 Bingh. N. C. 69); Jewell *v.* Harrington (19 Wend. 471); Sparrow *v.* Kingman (1 Comst. 246, 253); Cottle *v.* Sydnor (10 Missouri, 769).

In Reynolds *v.* Magness (2 Iredell's Law Rep. 30, 31), after stating the general rule, and that it applies only as between the parties, and not to strangers, Judge Gaston says: "They (the strangers) are at liberty to show that the written instrument does not disclose the full or true character of the transaction. And, if they be thus at liberty, when contending with a party to the transaction, *he* must be equally free, when contending with them. Both must be bound by this conventional law, or neither. . . Estoppels must be mutual."

In Walton *v.* Cronly (14 Wend. 67), the right of a party to a deed to explain it as against a third person was maintained, though such third person was a privy in estate. Besides, although written contracts may not be varied by extrinsic parol evidence in an ordinary action between the parties, yet when, as sometimes happens, there is a mistake in the writing, a party affected thereby is not remediless. By an action in equity he may have the writing reformed, and made to express the actual intent. In such an

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action it is not necessary, or allowable, or possible, to make all the world parties; those between whom the contract was made are alone heard. And, of course, if they happen to be both honest and intelligent, no suit for reformation can ever be requisite. This may suffice to illustrate the position now assumed.

Neither are the terms of a written contract conclusive as to the shares or proportions in which a set of parties on one side of the contract are interested in its fruits as between themselves. Such questions do not usually enter into the consideration of those who settle the forms of written contracts.

Each party, in framing the contract, considers only what, by its terms, he may exact from the other, and what the latter may thereby exact from him.

The parties of the first part in a contract may have no joint or mutual interest in the subject-matter; one may be merely the agent, clerk, or servant of the other; yet the paper would warrant, primâ facie, the supposal of an equal interest.

In an action on the contract against the other party no question of this sort can arise. But, surely, in a controversy between the parties of the first part, the paper is not conclusive and irrefragable evidence of a mutual and equal interest in the benefits of the contract.

If all the consignors had been expressly named as insured parties, the last-mentioned proposition would have full play in a controversy between them concerning the distribution of the insurance money. I have already shown that, as between them, the question would be entirely open.

5. In his 9th Lecture, § 26 (2 Duer on Ins. pp. 38, 39), Mr. Duer takes up a position which he imputes to Mr. Phillips, and condemns it.

It is, that one seeking to recover on a policy taken in his own name, applicable by its terms to his own interest, and on which he claims, cannot recover if in fact, through some mistake or misapprehension, he had in his mind at the time he effected the insurance, and intended thereby to cover, some other and different interest. He discusses this defence by an insurer at great length,

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onward to the end of § 29 (p. 48). He pronounces it novel, unreasonable, unconscientious and dishonest.

He concludes by asserting that as in such a case the policy is applicable, in terms, to the subject claimed upon, the insurer cannot be permitted to contradict it by parol extrinsic evidence of an intention on the part of the insured not to cover that subject.

Mr. Phillips, in a subsequent edition of his work, puts this very peculiar point as a quære, and suggests that "the jurisprudence on this subject is contradictory" (Phillips on Ins. 3d ed. §§ 393, 394).

These positions of Phillips and Duer are relied upon by the referee as justifying the exclusion of extrinsic evidence in the present case. Stating the point which they thus present must suffice to show that they have no relevancy whatever to the case in hand.

The precise nature of that point may be illustrated by a reference to facts in this case.

The policies, in the most express terms, covered Lee & Hall's interest in all the Defendants' lumber; that is to say, their lien for advances, &c. Let it be supposed that Lee & Hall had brought an action against the insurers, on the policies, with a view of recovering, for their own benefit, the amount of that lien, and that the insurers, for the purpose of defeating the recovery, had offered to show that Lee & Hall, when obtaining the policies, did not intend to cover that interest. Such, we may see, was the fact, and if the evidence was admissible, and allowed to have *any* effect, it would exonerate the insurers. Mr. Duer says that such a defence is inadmissible, because it would be an offer to prove that the intent of parties to a written contract was precisely the reverse of that which the written contract made by and between them explicitly affirms.

Mr. Phillips thinks "the jurisprudence on this subject is contradictory." It is enough for us to say that the point is not presented by the controversy between the litigants in this case.

Turner *v.* Burrows (5 Wend. 546), and the same case in error (8 Wend. 152), are relied upon as showing that parol extrinsic evidence of the intent of the party effecting the insurance is in-

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admissible in an action between him and a third person claiming to participate in the insurance money.

The judgment of the Supreme Court was not reversed on the ground that there was no error in receiving such evidence. The same controversy was again before the Supreme Court, and the final decision is reported in 24 Wendell, 276. Parol extrinsic evidence of the intent was again received. The Court held that it was properly received, and that nothing to the contrary could be inferred from the previous decision.

These cases are, therefore, authorities in favor of the Plaintiffs here. Cases in which a consignor was allowed to participate in the insurance money received by a consignee who had claimed the full value of the res from the insurers, under a policy in terms applicable to the consignor's interest, have no relevancy to the present case; neither do I perceive that the decision, or the opinion in Stillwell *v.* Staples (19 N. Y. 407), contains anything that conflicts with the views now expressed.

6. If the Plaintiffs were insured on their own interest in the Defendants' lumber, by virtue of their lien for advances and charges, they did not claim or receive anything from the insurers on that account; nor was this particular point made a ground of defence on the trial. The Plaintiffs tendered evidence that the Defendants were perfectly responsible, and that the policies were not intended to cover even this interest. As between the parties to this action, I think this evidence was admissible.

But whether this be so or not, the Defendants having waived the point at the trial, and again by this appeal, it cannot now be available.

The advances and charges were debts due from the Defendants to the Plaintiffs.

The lien was only a security therefor. The insurer of a creditor's lien is entitled, on paying the loss, to be subrogated to the demand of the creditor.

Consequently, the Defendants lost nothing by the Plaintiffs' omission to claim from the insurers their charges and advances on the lumber in question.

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Of course a different rule applies where the debtors pay, or allow themselves to be charged with, the premium paid by their creditors, on an insurance made by the creditors to cover their own specific property as lien holders (Phillips on Ins. 3d ed. § 397).

Further answers to any claim of this sort might be stated; but these should suffice.

The order appealed from should be affirmed.

Judgment absolute should be rendered against the Defendants for $1,156.37, and interest thereon from January 1, 1857, with costs of the action below, and also with costs of this appeal.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THE PEOPLE EX REL. HERMAN THOMAS AND OTHERS, RESPONDENTS, v. THE COMMISSIONERS OF HIGHWAYS OF THE TOWN OF MILTON, APPELLANTS.

Mandamus—Commissioners of Highways—Powers and Duties—Application for New Road.

The question whether two applications made to the Commissioners of Highways were in reality but one application, the latter intended as a correction of the former, is one of fact, to be determined by the finding of the Court below, with which the Appellate Court has nothing to do.

The Commissioners of Highways, in laying out a new road, may locate it in part upon an old road-bed. The principle which will authorize the intersection or crossing of an old road by a new one embraces the whole ground of locating a new road upon an old road-bed.

THE Respondents applied for an alternative mandamus to compel the Defendants to open a certain highway in the town of Milton, which the commissioners refused to lay out and open, and which, upon an appeal from the order of the commissioners, had been ordered by referees to be laid out and opened. The Defendants answered, setting up certain objections; and upon the hearing before the Judge at Special Term, it was ordered that a peremptory mandamus issue, directing the Defendants to lay out the road.

This judgment was affirmed at the General Term. The Defendants (the Commissioners of Highways) thereupon appealed to this Court. The facts are sufficiently stated in the opinion of the Court.

George C. Scott for Appellants.

A. Pond for Respondents.

HUNT, J.—Application was made to the commissioners of highways of the town of Milton, in the county of Saratoga, to lay out a highway, of the width of three rods, upon a centre line described.

The proposed road, as described in the application and in the final order, commenced at the centre of an existing highway, at

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a point sufficiently designated, thence by courses and distances "to the centre of the highway leading from Jamesville to Howard's Corners; thence following the public highway to a stake standing on the east line of the highway, south, &c.;" thence south across the lands of individuals named, and by courses and distances to the point of termination. The course, "thence following the public highway," carried the proposed road, for about a half a mile, on the bed of a then existing highway.

The commissioners refused to lay out the road thus applied for. Two orders of refusal were made, and appear in the case, each signed by two commissioners only.

The last order recites that, although concurred in by but two of the commissioners, the third had notice of the meeting, and signed the notice to the occupants of the land of the time and place at which the proceedings would be heard. The first order does not contain this recital. In other respects they are identical.

An appeal was taken from this determination to the County Judge, who, under the statute, appointed referees to hear and determine the appeal, who did "order, adjudge, and determine, in pursuance of the said application of the said Andrew Taylor, that a highway be, and the same is hereby, laid out as follows"—following the language of the application in the description of the road. The commissioners of highways still refused to lay out and open the road, and application was made for a mandamus to compel them to do so.

After a hearing at the Special Term, the Judge directed the issuing of a peremptory mandamus. The commissioners appealed to the General Term, where the order was affirmed, and they now bring their appeal to this Court.

The points made by the Appellants, to which it will be necessary to refer, are as follows: First. It is said that the application was for laying out two roads—one west of the existing highway, on which the new road was proposed to be laid; and the other east of it, and being the easterly end of the proposed road. In confirmation of this argument, the Appellants refer to the two orders of the commissioners refusing to lay out the road, and in-

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sist that such orders were decisions upon an application for two separate roads. This proceeding they insist is illegal. The Relator insists that there was but one application for a single road, and that the one order was a correction of a former order on the same determination. This proposition involves a question of fact rather than of law, and cannot properly come before this Court. The Judge at the Special Term held that there was but a single application, and that it was for one road only, and not for two roads. The General Term were of the same opinion. If our opinion differed from this it would be of no avail, as we have no jurisdiction over a question of fact thus presented. I entertain no doubt, however, that this point is not well taken. The applicant desired a road to be laid out and opened which should commence at the bottom of the Morris hill, near to the Jamesville road, thence along that road to the Greenfield crossing, thence over the lands of owners named to its termination, and all as one road and one proceeding. The applicant evidently supposed that it was legitimate to include a portion of the old highway in his proposed road, and did so include it. The making and filing of two orders by the commissioners is naturally explained by the fact, appearing upon their face, that the one is a correction of the other, in reciting that the commissioner who did not concur had been notified and taken part in the proceedings. There was but one determination by the commissioners, and but one review and decision by the referees.

The validity of the proceeding is attacked, in the second place, upon the ground that the proposed road included a portion of a highway already in existence. The counsel for the Appellants, in his first point, says: "It may be conceded that a new highway may intersect an old one, follow it for a convenient distance, and then resume its course. This may happen when it is apparent that the two parts, although interrupted for a short distance, were intended as one continuous route. But the identity must remain." It is difficult to deny the power of the commissioners to lay out a new road, which, in its course, crosses an existing highway. To cross it would occupy three or four, or six rods of

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the old road. If it may be occupied to that extent in crossing, it may be occupied to the same extent in a lengthwise direction.

There is no more of sanctity in a road in the direction of its length, than in that of its breadth. If it may be occupied for four rods, where is the principle which prevents its occupation for eighty rods, or for a hundred and sixty, as in the present instance? When the Appellants concede that the new road "may intersect the old one, follow it for a convenient distance, and then resume its course," I think the whole question is conceded.

The power being admitted, it becomes a question for the commissioners in the first instance, and for the referees upon the appeal, to determine what is a convenient or suitable distance for the occupation of the old road, and when it becomes suitable and proper that the new course should be resumed.

Each case will depend upon its own facts, arising from the nature of the ground, the amount and course of travel, present and prospective, the character and direction of the existing avenues, the expense to be incurred or diminished, and numerous other circumstances properly within the judgment of the commissioners or referees. No two cases can be exactly alike, and it is the object of the statute to submit all these questions to the determination, first, of the public officers of the town; and next to the revision of three freeholders from adjoining towns, having no interest in the subject-matter, to whom it is intrusted as referees. The judgment and discretion of these tribunals is conclusive, unless some rule of law has been violated in reaching their conclusion, or there has been some dereliction of duty. In the present case nothing appears which would justify us in interfering with their action upon the point now under consideration.

It is further insisted this judgment should be reversed, because, as it is alleged, there has been no survey of the entire road, and that it is not all laid out by courses and distances. I do not discover any evidence in the case that there has not been a survey of the entire road. A part of it is described by courses and distances, and a part of it by reference to a substantial monument, to wit: a public highway. It would be quite forced to infer, as

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a legal result, that the part described by monuments had not been surveyed.

The commissioners are required, if they determine to lay out a highway, to "make out and subscribe a certificate of such determination, describing the road so laid out particularly, by routes and bounds, and by its courses and distances, and shall deposit the same with the town clerk" (1 Rev. Stat. 515; 474 Statutes at Large, § 63). This section regulates the action of the commissioners, and does not in terms apply to the referees appointed by another statute.

It regulates their action only in the event of their determining that the highway shall be laid out, and that determination was not made in this case. I think it may be said, also, that the referees have fairly complied with this provision, assuming that it was intended to govern their action. A highway is a monument, as well recognized, as permanent, and as intelligible as a river, a bridge, a mountain, or a building. It is more permanent, less liable to become confused or buried by the lapse of time, than a location based upon measurements and the precise indications of the mariner's compass. A description by reference to an established highway is a description by "routes and bounds," and a sufficient compliance with the statute, if the provision should be deemed to be imperative rather than directory (Woolsey v. Tompkins, 23 Wend. 324; People v. Taylor, 34 Barb. 481; People v. Shepard, 36 N. Y. R. 285). It is not required that every portion should be laid out by measurement and courses, but a portion may be thus described, and other portions may be designated by other permanent bounds, routes, or monuments. The width of the road was sufficiently declared by the reference to the application and the adoption of its terms (Harris v. Commissioners, 2 Hill, 443; People v. Nevins, 1 Hill, 154; Jackson v. Freer, 17 John. R. 29).

Judgment should be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK, APPELLANTS, v. MICHAEL RYAN AND OTHERS, RESPONDENTS.

Bond—Surety—Public Officers—Enlargement of Duties—Discharge.

When the Legislature enlarge the duties of a public officer, it does not operate to discharge the sureties of such officer from their liability on his official bond.

J. S. Carpentier for Appellants.
E. T. Rice for Respondents.

DAVIES, CH.J.—The Defendant Ryan was sued in the New York Common Pleas, as the surety of one Sibberns, a constable of the city of New York. It is provided by the laws relating to that city (2 Rev. Laws, 397, § 147), that every person thereafter to be elected or appointed to the office of constable or marshal in said city, should, before he entered upon the execution of said office, enter into a bond, with one or more surety or sureties, in the penal sum of $500, jointly and severally to answer to the said Mayor, &c., and the parties, if any shall complain, and conditioned that such officer shall in all things perform and execute the duties of said office.

The complaint alleged that Ryan gave the bond referred to on the 14th day of January, 1857, and that, on the 8th day of May in the said year, the Defendant Sibberns, as constable, received two executions against the persons therein named; that, by virtue thereof, he took and carried away, on the 9th of May, 1857, the property of one John Redman, jun., and detained the same; that Redman brought an action against him therefor, and recovered judgment for the value of said goods, &c., to the amount of $83.25; that one execution had been issued on said judgment, and had been duly returned unsatisfied.

On the 13th day of April, 1857, an Act was passed to reduce the several Acts relating to the District Courts in the city of New York into one Act, and by this Act additional duties were imposed upon the constables of said city.

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It is not claimed that the duties theretofore incumbent on such officers have been changed, but only that additional or new duties have been imposed. Neither is it claimed that the acts for which the constable has been made liable in the present case, by the judgment recovered against him, were done in pursuance of any authority conferred by the Act of April 13, 1857.

It is quite clear that they were personal, and discharged under and by virtue of the then existing provisions of law, and had no connection whatever with the Act of April 13, 1857.

The Judge at Special Term held, that after the bond in suit was given, the Legislature, by the Act of April 13, 1857, had enlarged the jurisdiction of the District Court, and imposed new duties upon constables, and that when a surety enters into a bond for the faithful performance by his principal of the duties of an office, and after the giving of the bond the duties of the office are altered so as to increase or vary the risk of the surety, the bond cannot be enforced against the surety, although the act relied upon as a breach of the condition would have been a violation of the officer's duty before the alteration was made.

This judgment was affirmed at the General Term of the New York Common Pleas, and the Plaintiffs appeal to this Court.

The precise point raised by this appeal has lately been under consideration by this Court, and been decided.

In the case of The People *v.* Alden Vilas and others, decided at the last March Term, we held precisely the opposite doctrine.

In that case the Defendants became the sureties, on the 15th day of January, 1850, of one Mahlon P. Jackson, as commissioner for loaning certain moneys of the United States for the county of St. Lawrence.

On the 10th of April, 1850, the Legislature imposed new obligations on the principal in the discharge of the duties of his office, and it was insisted that the sureties were consequently discharged.

This Court thought otherwise, and held that the sureties were not discharged.

That case is decisive of the one now under consideration, and

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it is unnecessary to again discuss the question, or again refer to the authorities which, we believe, fully sustain the result at which we then arrived.

The judgment appealed from must be reversed, and a new trial ordered, costs to abide the event.

All concur, except PORTER and BOCKES, JJ., not voting.

Reversed.

JOEL TIFFANY,
State Reporter.

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THE WESTERN TRANSPORTATION CO., APPELLANT, v. CHARLES H. MARSHALL AND OTHERS.

Bill of Lading—Advances made in Good Faith to Intended Purchaser.

Where the master of a vessel, laden with wheat for transportation, according to the custom, gives a bill of lading of the wheat to the parties producing the measure return intended for the purchaser, and the parties so receiving the bill of lading obtain an advance thereon, made in good faith, the parties making such advance acquire an interest in such cargo to the amount of such advance.

This is upon the principle that one purchasing in good faith from a fraudulent vendor acquires a good title.

THIS action was brought to recover the possession of a quantity of wheat. The wheat was shipped by Plaintiff from Buffalo to New York upon a canal-boat. The agents of the Plaintiff in the latter city agreed to sell the wheat, for cash on delivery, to Meyer & Ree, who were engaged in purchasing wheat, and shipping it to England. The latter agreed with the owners of the Great Western to ship the wheat to England on that vessel. At the request of Meyer & Ree, the wheat was measured in the usual way, and placed on board the vessel in the name of the agents of the Plaintiff. It was proved that the measurer was selected, and made the measurement according to the usual course of business between vendor and purchaser, made duplicate bills of the measurement, and delivered them to the agents, agreeably to the usual custom in that business; that the agents made out a bill of the amount of the price of the wheat, including the purchaser's proportion of the expense of measurement, &c., and delivered the same attached to the return of the measurer, intended for the purchaser, to Meyer & Ree; that the latter, upon this return of the measurer, procured from the captain of the vessel a bill of lading of the wheat in the usual form, and upon this bill procured an advance from some of the other Defendants, without having paid anything on account of the purchase of the wheat. Shortly after, the Plaintiff's agent sent to Meyer & Ree for the money for the wheat. The latter, after a day or two, gave the agent their check for the price of the wheat, which the agent de-

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posited in a bank, and the next day the check was refused payment and returned to Meyer & Ree. It was proved that Meyer & Ree were in good credit at the time of the agreement to purchase the wheat, but suspended payment shortly after, in consequence of advice of non-payment of their drafts in England. It was proved that none of the Respondents had any knowledge that the wheat was not paid for, or that the Plaintiff claimed any interest therein. It was proved that the universal custom of masters was to give bills of lading for grain delivered on board to a person producing the measurer's return intended for the purchaser; that this return was an exact duplicate of the one retained by the vendor, except that it called for payment of one-half of the charges only, and that the custom was known to all engaged in the grain trade. It was proved that Plaintiff's agents had been for some time engaged in this trade. Upon the return of the check of Meyer & Ree unpaid, the Plaintiff demanded the wheat of the master, and upon his refusal to deliver the same, commenced the action. At the close of the proof the Respondents, who are the master and owner of the vessel, and the parties who made the advances to Meyer & Ree upon the bill of lading, moved for a dismissal of the complaint as to them, which was granted, and Plaintiff excepted. After affirmance of the judgment by the General Term, the Plaintiff appealed to this Court.

John Hubbell for Appellant.

Wm. Allen Butler for Respondent.

GROVER, J.—There was no conflict in the evidence so far as these Respondents are concerned. The Plaintiff's agents agreed to sell the wheat to Meyer & Ree for cash on delivery, and had the same, at the request of the latter, measured and placed on board of the vessel in their names, receiving from the measurer two bills of the measurement, one designed to be retained by the vendor, and the other for delivery to the purchaser. They delivered the latter, together with a bill of the price of the wheat, to Meyer & Ree. The proof showed that the universal custom in the trade was for masters of vessels to deliver bills of lading of

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grain on board, to the one producing this measurement prepared for the purchaser. This custom the agents are presumed to have known. By its delivery to Meyer & Ree the agents authorized the master to deliver to them a bill of lading of the wheat just so effectually as though such authority had been expressly given by them. When the master had, by the authority of the agents, delivered a bill of lading to Meyer & Ree, he was not bound to deliver the wheat to the Plaintiff, without being discharged from the liability created by the bill. This was not done, nor was any indemnity offered by the Plaintiff against such liability. The complaint was therefore properly dismissed, as against the master and owners of the vessel. It is equally clear that, the bill of lading having been delivered to Meyer & Ree by authority from the Plaintiff, those who dealt in good faith with them, as owners of the wheat, will be protected in such dealings. Consequently, the complaint was rightly dismissed as to Morgan and others, who made advances to Meyer & Ree on the credit of the bill of lading, and to whom the bill was transferred as security for such advances.

It was not material to the rights of the Respondents whether Meyer & Ree acted in the premises with a fraudulent intent or not. One purchasing in good faith from a fraudulent vendor acquires a good title (Mowrey *v.* Walsh, 8th Cowen, 238; Root *v.* French, 13th Wend., 570). The principle of these cases is applicable to the present case. Hence, the admission of the evidence that it was customary for purchasers of grain in the city of New York to raise money upon bills of lading thereof, to pay for the same, was wholly immaterial, and worked no prejudice to the Plaintiff in respect to these Respondents.

The exception thereto is, therefore, not available upon this appeal.

The Judgment appealed from should be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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CALVIN GOODWIN, APPELLANT, v. MARY NELIN, RESPONDENT.

Contract for Sale of Real Estate—Voidable—Election of Vendor.

Where, by the terms of the contract of purchase of real estate, if the vendee fails to make payments at the time they become due, the contract is to be void; and the vendee failing to make his payments, the vendor signifies his election to treat the contract as void by bringing ejectment and recovering possession of the premises, the contract is thereby avoided, and the title of the vendee under said contract ceases.

Wm. Tiffany for Appellant.
D. H. Marsh for Respondent.

DAVIES, CH.J.—This action was originally commenced by Jonathan Goodwin, who died, and by his last will and testament gave all his right, title, and interest in the subject-matter in controversy to the present Plaintiff, Calvin Goodwin; and the suit has been continued in his name.

The complaint set forth that one Francis Hunt had a contract, in writing, with one Albert G. Bristol, for the purchase of a piece of land in the city of Oswego, for the sum of $500; that said Bristol had covenanted and agreed with said Hunt that, on payment of said sum, and the interest thereon, he would convey the said land to him by a good deed, in fee-simple; that said Hunt, during his lifetime, had paid the whole amount of said purchase-money, and had fully performed all the covenants on his part required by said contract; that said Hunt took possession of said premises, and retained possession thereof until his death; that upon his decease the Defendant, Mary Nelin, a sister of said Hunt, took possession of said premises, to the exclusion of the other heirs of said Hunt, and retained the same. The complaint further stated that proceedings had been instituted by the administrators of said Hunt, before the Surrogate of Oswego county, for the sale of the real estate of said Hunt; that such sale was ordered and had, and that

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on such sale the said Jonathan Goodwin had become the purchaser thereof, and had received a deed therefor.

The Complainant prayed that the Defendant might be ordered and adjudged to deliver up said contract, and receipts therein mentioned; might come to an account for all moneys paid by her on account of said purchase, if any; might also account for the rent and profits of said premises, and might be decreed to deliver up the possession thereof; or for such other relief as the said Plaintiff might be entitled to.

The action was tried by the Court, without a jury, and the following facts were found:

First. That said Francis Hunt, some time between the years 1845 and 1850, contracted to purchase of Albert G. Bristol, of Rochester, the piece of land mentioned in the complaint, on the north end of Block No. 86, in the city of Oswego, for the sum of $500, part of which was paid down, and the remainder was to be paid in yearly payments; said Bristol to give a deed therefor on the payment of all the purchase-money at the times when the same became payable, according to said contract; that the contract by its terms was to become void on failure *to pay according to its terms;* and possession was taken of said lot by said Hunt. The purchase-money all became due before September 20th, 1852; and at that date there remained due and unpaid on said contract $200 of principal, besides interest, which moneys so due have not been paid or tendered to said Bristol, or to any one else.

Second. That said Francis Hunt died on the 16th of September, 1851, intestate, leaving Denis Nelin and Mary Nelin in possession of said lot; that such proceedings were had before the Surrogate of Oswego county that, on the 11th day of May, 1853, letters of administration upon the estate of said Francis Hunt were issued to Catherine Oats and Thomas Hunt, they executing the usual bond in such case; that such proceedings were thereafter had on the application of said Catherine Oats, before said Surrogate; that afterward, on the 6th of February, 1854, the said Surrogate ordered said administratrix to sell and assign all the interest of said contract, subject to all payments that were to be-

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come due thereon, after the granting of said order for the payment of the debts of said intestate; that, before granting such order, no bond was given, such as is required by the statutes, on ordering the mortgaging, leasing, or selling of real estate of deceased persons for payment of their debts; that on the 9th of August, 1854, such bond was executed and acknowledged, and marked by the Surrogate thus: "Approved, Aug. 9th, as of February 6th, 1854;" that by virtue of said order of sale, said administratrix, on the 30th of September, 1854, sold said contract to Jonathan Goodwin for $250; that on the 9th of October, 1854, said sale was confirmed by an order of said Surrogate; that neither on the proceedings for such sale, nor at any time, was any other bond than the two mentioned made or executed, or filed with said Surrogate.

Third. That on the 20th day of September, 1852, $200 of principal, with interest, being due and unpaid on said contract, the said Bristol declared said contract void, and commenced an action of ejectment in the Supreme Court, for the recovery of the possession of said lot, against the said Denis Nelin, and Mary Nelin, his wife, the parties in possession of said lot; that such proceedings were had in such action that, afterward, on the 30th day of October, 1852, judgment was duly rendered in said action in favor of the Plaintiff therein for the possession of said premises, and for $13.35 costs.

Fourth. That on the 15th day of June, 1853, the said Bristol sold and conveyed the said lot to the said Defendant, Mary Nelin.

And as matter of law the Court did find and decide that the proofs did not sustain the action. Whereupon, the complaint was dismissed, and judgment rendered for the Defendant; and on appeal the same was affirmed; and the Plaintiff now appeals to this Court.

Upon the trial the Defendant produced the judgment-roll in the action of ejectment, in favor of Bristol, against said Denis and Mary Nelin, and the Plaintiff objected that this constituted no defence; but the Court held that it did, unless obviated by

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showing that it was fraudulent, to which the Plaintiff excepted. Plaintiff offered to show the declaration of the Defendant, to the effect that she had paid to Bristol the whole amount due upon the contract, and had received a deed from Bristol for the said premises; and also offered to show the assignment of demands to Goodwin against Francis Hunt, by his administratrix, and offered to prove the execution of a conveyance by said administratrix, dated October 9th, 1854, to said Goodwin, of all the interest of said Francis Hunt in said real estate, and in all contracts for the purchase thereof. All of which was excluded, and the Plaintiff excepted. The Plaintiff also excepted to the decision of the Court dismissing the complaint.

These exceptions present the only question for the consideration of this Court. Upon the facts found by the Court it is very clear that the Plaintiff had no standing in Court to impeach the title of the Defendant, Mary Nelin, to the lot in question. He certainly had no greater rights than were possessed by his grantor, the administratrix of Francis Hunt. If it be true, as found by the Court, that the contract, by its terms, had terminated, and Bristol had the right to declare it forfeited and terminated, as it is found he did, and proceeded to enforce his rights upon that basis, and did recover the possession of said premises, it is not seen why he had not a perfect right to sell the said premises to whosoever he pleased, and why the Defendant could not purchase the same, and acquire a perfect title thereto. Upon these facts, no title or interest remained to the estate of Francis Hunt, at the time of the initiation of the proceedings in the Surrogate's Court, to sell his real estate, or his interest in the said contract of purchase. By the terms of the contract, that interest had terminated on the 20th day of September, 1852; and on that day Bristol, by the act of commencement of the action of ejectment, elected so to regard it; and on the 30th day of October succeeding, obtained judgment in said action, and was therefore entitled to the possession of said premises. It is not pretended that said recovery was fraudulent or collusive. On the 15th of June, 1853, Bristol, then the owner of said premises,

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sold and conveyed the same to the Defendant, Mary Nelin, for a valuable consideration, and this action is on the notice of an ejectment to recover such possession. It cannot be maintained, for the very obvious reason that the Plaintiff has shown no title to the premises claimed. He cannot recover upon the weakness of the Defendant's title, but upon the strength of his own. The title of the Plaintiff was acquired more than a year after the Defendant had received a deed for the premises in dispute from the conceded true owner thereof, and when she was in possession of said premises, and holding the same adversely to any title the Plaintiff had, or could have, from the representatives of Francis Hunt. If he had survived, he could not have set up any title to said premises until he had performed, or offered to perform, said contract on his part. This, neither the Plaintiff nor those from whom he derived title had ever done. If they had any right, or had acquired any under such contract, it could not be asserted or enforced, unless it was made to appear that they, or those under whom they claim, had performed the same, or had offered to perform on their part. They were clearly not entitled to a deed from Bristol until this was done. And as the Court had found, as a fact, that the money due upon this contract was never paid to Bristol, or tendered to him, or any one else, it is very apparent that the Plaintiff, or those under whom he claims, never had, or were entitled to have, a title to said premises.

If we assume that the Defendant succeeded to all the duties and responsibilities imposed by the contract upon Bristol, and that the Plaintiff has possessed himself of all the rights of Hunt under the contract, how then stands the Plaintiff's right to maintain this action? It cannot be contended, as already observed, that he has any greater or other rights under the contract than Hunt would have had if living. Before he or his assignor could have obtained title to the premises in question, by virtue of this contract, it was a prerequisite on his part that there should have been performance by him, or an offer to perform, and payment of the amount due, or tender of such payment. None of these things were done; and the Court has found the fact that the

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moneys due upon the contract were never paid or tendered to Bristol, or to any one else. This latter branch of the finding is sufficiently comprehensive to include the Defendant. We thus see that the Plaintiff, and those under whom he claims, never had the title to said premises, and never were entitled, either legally or equitably, to such title. It follows, from these views, that the Court properly dismissed the complaint, and gave judgment for the Defendant, and that the exception to such decision is untenable. It is unnecessary, in this aspect of the case, to consider the exception taken to the admission and rejection of the testimony offered.

The exclusion of that offered, and the admission of that objected to, would not have improved the Plaintiff's case, and therefore these rulings worked no injury to him. Without intimating any doubt as to the correctness of the rulings made, it is only needful to add that the decision of the case does not call for any expression of opinion in regard to them.

The judgment appealed from should be affirmed, with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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ROBERT GORDON AND JAMES PURSE, APPELLANTS, v. LEWIS H. HOSTETTER, RESPONDENT.

Trover and Conversion—Bills and Coin—Embezzlement.

In an action to recover damages for money of Plaintiff's embezzled by Defendant, it is not necessary to prove the specific money in gold or bank bills embezzled to entitle the Plaintiff to recover. It is sufficient to show the money taken to be the Plaintiff's money; also the amount taken, and the felonious taking of it by Defendant.

Money is as much the subject of conversion as any other description of personal chattels. The admission by the Defendant that the money was the property of the Plaintiff, and that he had taken a certain amount, furnished sufficient evidence to entitle the Plaintiff to recover.

APPEAL from the Supreme Court. The Plaintiffs were merchants of the city of Oswego, and the action was to recover damages for the conversion of money, embezzled by the Defendant, as their clerk.

The complaint alleged that, between the month of September, 1860, and the succeeding January, the Defendant wrongfully took and converted to his own use certain money, the property of the Plaintiffs, consisting of bank-bills, and of gold and silver coin, of the amount and value of $90, to the Plaintiffs' damage one hundred dollars, for which they demand judgment.

The answer denied each of these allegations. The cause was tried at the Oswego Circuit. It appeared on the trial that the Defendant was in the employ of the Plaintiffs as a sales-clerk in their dry-goods store, from the 12th of October to the 20th of December, in the fall of 1860.

There were eight clerks in the store, all of whom were salesmen; and the course of business was this: each clerk sold goods, received the pay, and put the money in the drawer. The Plaintiffs had no cashier, and they kept no account of sales during the day. They entered, at night, in the cash-book, the amount of the day's sales, arriving at the sum by the amount found in the cash-

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drawers at night. The duty of the Defendant was simply to sell goods, to receive the money, and put it in the cash-drawers.

He was engaged at a salary of $325 a year, and was about twenty-four years of age. He had received small sums in payment at different times, which he was in the habit of charging to himself, at the time of payment, in the Plaintiffs' book. There was a balance still due on his salary, which the Plaintiffs, on the trial, offered to allow, in diminution of the amount claimed, but his counsel declined to accept it.

While he was in their employ, the Plaintiffs missed money several times; but none of which they could speak with certainty, except a quantity of gold, amounting to about $15, which they missed about a week before he left. He was arrested at the store on the 20th of December. After he was taken, he requested the chief of police and his assistant to return with him to the store, that he might have an interview with Mr. Gordon, one of the Plaintiffs. The latter refused to converse with him, except in the presence of the officers. He asked Gordon what they were going to do with him. Gordon said they were going to send him to State prison. He asked if Gordon supposed he had stolen their money. Gordon replied that he was sure of it. The Defendant asked him if it could be settled. Gordon inquired how much he had taken. The Defendant answered: "Eighty-five or ninety dollars, within the last month."

Three days afterward, the Plaintiff Purse, at his request, went to see him at the police-office. The Defendant told him he would like to settle it. Purse asked him what amount he had taken from them. He replied that he had taken from them, at different times, from $85 to $90; not to exceed $90. These facts were undisputed.

The Defendant moved for a dismissal of the complaint, insisting, among other things, that the Plaintiffs had not shown that they owned, or that he had converted, any specific money, either in bills or coin; that, for aught that appeared, he had received the money, as their clerk, from the customers, without putting it in the drawer, and in that case they had mistaken their remedy, which should have been by an action for money had and

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received; and that if he had converted the money, as alleged, it was an act of felony, for which he could not be held civilly responsible until after conviction. The motion was denied, and the Defendant excepted.

No evidence being offered on his part, the jury, under the direction of the Judge, rendered a verdict in favor of the Plaintiffs for $87.10.

The Court reserved the case for further consideration, and finally ruled, as matter of law:

1. That the action, being in the nature of trover, could not be maintained without proof that certain specific property had been converted by the Defendant.

2. That under the complaint the Plaintiffs were not entitled to recover for money had and received, generally, to the Plaintiffs' use.

3. That they were not entitled so to amend the complaint as to enable them to recover in that form.

4. That they had failed to prove the conversion of any particular money, except the $15 in gold.

5. That the verdict should be reduced to $15, unless the Plaintiffs elected to submit to a nonsuit.

The Plaintiffs declined so to elect, and excepted to these several rulings. The judgment entered thereon was affirmed, on appeal to the General Term of the Fifth Judicial District, Mullen, J., dissenting. The Plaintiffs thereupon appealed to this Court.

Daniel H. Marsh for Appellants.

Alburtus Perry for Respondent.

PORTER, J.—The action was not for the recovery of the specific money embezzled. It was to obtain damages for the Defendant's wrong in taking from the Plaintiffs, and converting to his own use, coin and bills of a specific value and amount, which were alleged and proved to be their property. By taking and retaining their money, he put it out of their power to distinguish it from other like coin and bills; and while he admitted the amount taken, he claimed that he was not answerable for the wrong until

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they had so described what he had embezzled as to enable him to identify it. The Court not only sustained this view, but also held, that under a complaint alleging the facts, and upon proof of their exact truth, he was not responsible for the amount, even as for money had and received. We think the decision erroneous, and that the Judge was right, in the first instance, in directing a verdict for the full amount in favor of the Plaintiffs.

Money is as much the subject of conversion as any description of personal chattels. Under the ruling of the Court in this case, a party appropriating it wrongfully would ordinarily be secure of immunity. No one, in the practical affairs of life, retains a specific description of each bill which comes to his hands. Our statute of embezzlement assumes this, in making it a criminal offence in a clerk or servant to "convert to his own use" the money of his employer, or "to make way with or to secrete it," with intent to convert it to his own use (2 R. S. 678, § 59). If the fact of the unlawful taking be established, and the amount converted is ascertained, the culprit cannot avail himself of his own act, in secreting or destroying the bill, as a protection against civil or criminal prosecution.

In the present case the fact was established, by the admission of the Defendant, that the money which he took was the property of the Plaintiffs; and, as the amount was conceded, there was no occasion to prove the particulars in which the coin and bills in question differed from all others of like denomination. The evidence supplied every fact essential to show the conversion, and to fix the measure of damages. The money was identified, so far as was needful to determine the rights of the parties; and the Plaintiffs were bound to go no further. A similar objection was raised in this Court, in an action of replevin for bank-bills, which were not so described in the pleadings and proofs as to distinguish them from other similar bank-bills, but which corresponded in amount with the money wrongfully withheld. The appropriate answer was given by Judge Grover, who delivered the opinion of the Court: "All that is necessary is, that the proof should be sufficient to enable the Court to give judgment

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for the delivery of the particular thing to which the Plaintiff is entitled; and if the Defendant has so disposed of that thing that delivery cannot be made upon the execution, then the *value* is to be collected of the Defendant in satisfaction of the judgment" (Graves *v.* Dudley, 20 New York, 80). So, in this case, all that the Court could require was proof of property in the Plaintiffs, of conversion by the Defendant, and of the damages resulting from the wrong.

It was held in an early case, that trover "lies not for money found, unless it be in a bag or chest" (Holiday *v.* Hicks, Croke's Eliz. 661). But, in another cause, determined two years afterward, when the Plaintiff obtained a verdict for the conversion of part of the contents of a bag of gold, a motion was made in arrest of judgment, on the ground "that trover and conversion of money out of a bag cannot be good, because it cannot be known." The Judges held "that an action of trover and conversion of money only, was good enough, and an action well maintainable for it" (Draycot *v.* Piot, Croke's Eliz. 818; Hall *v.* Dean, id. 841).

All doubt on the question arising from the legal fiction of loss and finding in the old action of trover was set at rest in a subsequent case in the Exchequer Chamber. The objection was there taken that the action would not lie for money out of a bag, which, from the nature of the case, could not be identified. "But," says Croke, "all the Justices and Barons agreed that it well lies; for, although it was alleged that money lost cannot be known—and so, whether it was the Plaintiff's money, whereof the trover and conversion was—yet the Court said, it being found by a jury that he converted the Plaintiff's money, the Plaintiff had good cause of action. Wherefore, the judgment before well given was now affirmed. The Justices and Barons said that this action lies as well for money out of a bag as of corn which cannot be known" (Kinaston *v.* Moor, Croke's Charles, 89). The doctrine of this case has since been accepted as settled law; and trover has been repeatedly held to lie for the conversion of determinate sums, though the specific coin and bills were not identi-

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fied. "The design of this action," as was well said by Bacon, "is not to recover a thing in specie, but to recover damages for the conversion thereof" (9 Bacon's Ab. 651, Trover, D; Chitty on Pleading, 146; Jackson v. Anderson, 4 Taunton, 24, 29; Kimberly v. Patchin, 19 New York, 336; Dows v. Bignall, Lalor's Supp. 407; McNaughton v. Cameron, 44 Barbour, 406).

The case of Orton v. Butler, on which the Respondent mainly relies, is irrelevant to the question we have been considering. It arose on demurrer to a count in a declaration, which alleged that the Defendant had received ten shillings to the use of the Plaintiff, to be paid to him on request; and that upon being requested to pay it, he refused, and converted the money to his own use. The Plaintiff insisted that this was a good statement of a cause of action in trover. The Court sustained the demurrer, holding that to make the count sufficient in trover, he should have alleged, either that the money was his, or that it had previously been in his possession. The decision was clearly right, but it has no application to the complaint before us (5 Barn. & Ald. 652).

It follows from these views that the Plaintiffs were entitled to the full amount of the verdict, on the basis of a tortious conversion.

It is proper, however, to say, that even if we had arrived at a different conclusion on this point, we should hold the verdict good, as for money had and received, on the waiver by the Plaintiffs of the tort alleged. It is true that, under ordinary circumstances, the refusal to pay over money had and received to the use of another, is not in law a conversion. It does not, however, follow from this, as a counter-proposition, that, under our present system of pleading, a party who has alleged and proved facts entitling him to judgment as for money had and received, will be barred from that relief by his failure to prove other and further allegations, which would have entitled him to a more stringent remedy. The material arguments of the complaint, in this regard, were fully sustained by the proof. The facts were undisputed. The Defendant was not misled or surprised; and we see no reason why the Plaintiffs were not at liberty to waive the tort,

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and amend their prayer for judgment, if they elected so to do, in view of the adverse ruling of the Court (Byxbie v. Wood, 24 New York, 607; Wright v. Hooker, 10 id. 51; Cobb v. Dows, id. 335, 342, 346).

The Supreme Court was clearly right in holding that, under our statute, the civil remedy of the Plaintiffs was neither merged in the alleged felony, nor suspended until the conviction of the offender (2 R. S. 292, § 2; Code, 7). Other objections were raised on the trial, but it is sufficient to say that we do not consider them well founded.

The judgment should be reversed, with final judgment for the Plaintiffs on the original verdict.

All the Judges concurring,

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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ROBERT GREENE AND BENJAMIN F. GREENE, v. JAMES M. WHITE.

Contract for Sale of Vessel—Breach—Measure of Damage.

Where an action is brought to recover damage for a breach of contract, the Plaintiff will not be entitled to recover unless he prove that he has sustained damages.

Where the contract was for the purchase of a vessel at $3,000, and the freight thereof, earned upon the trip she was then making, if it was proved on the trial that the vessel and freight together were not worth $3,000, the Plaintiff could not be entitled to recover.

THIS action was brought upon a contract, of which the following is a copy.

"Agreement made thirteenth day of September, 1860, between James M. White, of the one part, and Robert Greene, and Benjamin F. Greene, of the other part, as follows: The said White hereby agrees to sell, to said R. and B. F. Greene, the schooner called the Lucy Orchard, her tackle, apparel, furniture and boat (now on a trip to Brighton), for the sum of three thousand dollars, and to deliver her and give a bill of sale of her to them, free of liens and encumbrances, on her arrival at Oswego, on the said R. and B. F. Greene paying to him, in cash, $250, and their promissory notes, payable as follows, viz.:

One	payable	January	1st,	1861,	for	$250,	with	interest.
"	"	July	1st,	"	"	500	"	"
"	"	January	"	1862	"	500	"	"
"	"	July	"	"	"	500	"	"
"	"	Dec.	"	"	"	500	"	"
"	"	July	"	1863	"	500	"	"

"And the said R. and B. F. Greene, in consideration thereof, agree, on the arrival of said schooner, and a delivery of a bill of sale of her, her tackle, apparel, furniture and boat, to pay and give their promissory notes to said White, payable as above. It is understood by the parties that said R. and B. F. Greene are to have the freight earned by said schooner on her present trip out

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and back, they paying the expenses of the trip. In witness whereof, the parties have hereto subscribed their names the day and year first above written."

"J. M. WHITE,
B. F. GREENE,
ROBERT GREENE."

The Plaintiffs proved a tender of the money and notes, and a demand of a bill of sale of the vessel, and a refusal by the Defendant. Evidence was given of the value of the vessel, ranging from $5,000, as the highest estimate, to $2,500, as the lowest. Evidence was also given tending to show that the freight earned by the schooner, on her then trip, exceeded her expenses.

The Judge charged the jury that the rule of damages, in regard to the vessel, was the difference between the contract price for it, and its actual value. That if they should assess the value of the vessel at the contract price, or less than that, then no damages could be given to the Plaintiffs, on account of the vessel, but that the Plaintiffs would nevertheless be entitled to a verdict for such net freight as the jury should find had been made on the trip.

The Defendant's counsel requested the Court to charge the jury, that if the value of the vessel, and the net freight together, did not exceed $3,000, the Plaintiffs were not entitled to recover.

The Judge refused so to charge, and the Defendant excepted.

The jury found a verdict for the Plaintiffs for $700.

The General Term of the Fifth District affirmed the judgment entered upon this verdict.

The Defendant appeals to this Court.

A. Perry for the Appellant.
D. H. Marsh for the Respondents.

HUNT, J.—The proposition "that if the value of the vessel, and her net freight together, did not exceed $3,000, the Plaintiffs were not entitled to recover," was sound, and the Judge erred in refusing so to charge the jury.

The Judge erred in his charge actually made, "that if they should assess the value of the vessel at the contract price, or less

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than that, then no damages could be given to the Plaintiffs, on account of the vessel, but that the Plaintiffs would nevertheless be entitled to a verdict for such net freight as the jury should find had been made on the trip."

The contract for the purchase of the vessel and her freight was entire. The two subjects together were purchased, and sold, at the price of $3,000, and as one purchase and sale. There is no power or right of separation into parts. If the aggregate value of the vessel and her freight did not exceed the price agreed to be paid for them, then no damages were sustained by the Defendant's refusal to deliver.

That this charge was erroneous was also the opinion of the General Term of the Fifth District, the opinion being delivered by the same Judge who presided at the Circuit. The judgment was affirmed upon the ground, that although the charge was erroneous, it was overruled by the verdict of the jury, and that no injury was sustained by the Defendant in consequence of the error.

If it is possible that the Defendant was injured by this error, the verdict must be set aside.

It is not for the Defendant to show how, or to what extent he was prejudiced. The existence of the error establishes his claim to relief.

If the Plaintiffs wish to sustain the verdict, it is for them to show it did not, and could not have affected it (Thacher *v.* Jones, 31 Maine R. 528, 534; Lane *v.* Crombie, 12 Pick. R. 177; Clarke *v.* Dutcher, 9 Conn. R. 674; Camden & Amboy R. R. Co. *v.* Belknap, 21 Wend. 354; The People *v.* Wiley, 3 Hill, 194).

The Plaintiffs insist that this is established. They insist that if the jury did not find the vessel to be worth less than $3,000, then the latter portion of the objectionable charge—that the Plaintiffs would still be entitled to the value of the net freight—was not applicable. The contingency did not occur. The verdict of $700 is claimed to be conclusive evidence that the vessel alone was worth more than $3,000; as no witness put the value of the freight at more than about $200. This may be true, and I think

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it quite probable that it is. It would, however, be unsafe to disregard an admitted error on this theory. No one can certainly say how the minds of individual jurors are affected, or how a united result was reached.

The fact, as charged by the Judge, that the parties had themselves, by their contract, fixed the value of the vessel at $3,000, was evidence that it was worth that sum.

There were conflicting valuations by different witnesses, ranging from $2,500 to $5,000. Can any one undertake to say that some juror was not influenced by this statement, and, in consequence thereof, added one hundred or two hundred dollars to the sum he was willing to agree upon as a verdict, more than he would otherwise have done? With the Defendant striving to show that the vessel was worth but $2,500, and the Plaintiffs claiming a larger sum, it would be rash to say that an assertion by the Defendant, deliberately made, and in writing, that the vessel was worth $3,000, did not weaken his case, and strengthen that of the Plaintiffs.

The Judge, in substance, charged that the Defendant had so asserted and agreed.

New trial should be ordered.

Reversed.

JOEL TIFFANY,
State Reporter.

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FRANCIS S. COGHLAN, RESPONDENT, v. WILLIAM B. DINSMORE, PRESIDENT OF THE ADAMS EXPRESS CO., APPELLANT.

Promissory Note—Failure of Collector to Protest—Liability.

Where the American Express Company had undertaken to present a promissory note to the maker thereof for payment, or procure it to be protested, and neglected or refused so to do, by means of which one of the endorsers of such note was discharged from his liability as endorser, held, that the Express Company was liable for such omission to present the note for payment and procure it to be protested.

THIS action was brought to recover from the Defendant the amount of a promissory note, as damages charged to have been sustained by the Plaintiff, by reason of the alleged omission of the Adams Express Company to cause the said note to be presented for payment, and to be protested at New Orleans, according to contract.

On the trial the Plaintiff proved that, upon the sixth of April, 1861, he was the owner of a certain promissory note, made by one G. M. Nichols, payable to the order of Saltus & Co., and endorsed by them and one Anna Saltus, for nineteen hundred and twenty-two dollars and thirty-four cents, payable ten months after date, at the office of Payne and Harrison, in New Orleans.

On that day he gave the said note to the Adams Express Company for collection, and ordered that it should be protested, if not paid. He at the same time took a receipt from the Defendant, setting forth the contract. The note was subsequently brought to the Plaintiff, by some person in the employ of the Defendant, who asked him to take the note and give a receipt for it. This the Plaintiff refused to do, on the ground that it did not appear to have been protested. No certificate of protest was attached to the note.

The Plaintiff afterward called at the office of the Defendant,

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and had some conversation with the person in charge, who said that he did not know anything about it, but promised to write and inquire why the note had not been protested. The Plaintiff never heard further from the Defendant upon the subject.

On this statement, the Plaintiff rested his case.

A motion was made for a nonsuit, which was denied.

It was proved, on behalf of the Defendant, that Nichols, the maker of the note, resided at Shreveport, La., and gave the note to Saltus & Co. for the purchase of iron.

That he was here in April, 1861, but did not return to his place of business, in consequence of the political troubles which prevailed at that time.

He made an arrangement at this time with Saltus & Co., by which he was to pay them one thousand dollars upon this note, and they agreed to protect the note, and extend the time of payment of the balance. This they failed to do. It was agreed, notwithstanding this arrangement, that the note should be protested.

Jno. H. Reynolds for Appellant.
Wm. Allen Butler for Respondent.

FULLERTON, J.—The nonsuit in this case was properly denied. When the Plaintiff rested, he had proved the contract, by which the Defendant had received the note for collection, and agreed, if it were not paid on presentation, to have the same protested, and he had further given some testimony tending to prove that this contract had not been performed.

It appeared that when the note was returned to the Plaintiff, by the Adams Express Company, no certificate of protest was attached to it, and the Plaintiff refused to receive it for that reason. It was not then pretended, by the person having the principal charge of the affairs of the company, that the note had been protested, and he promised the Plaintiff that he would write and inquire *why it had not been done.*

The Plaintiff never heard from the company, or any of its officers, after that interview.

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Upon this evidence the jury could properly have found that the note had not been protested, in compliance with the Defendant's contract, and it would not have been proper to have taken the case from them.

After the close of the testimony, the Court ruled:

1. That the evidence on the part of the Defendant did not amount to proof of waiver of notice of non-payment, and notice of protest by Saltus & Co., the endorsers of said note.

2. That such evidence was not sufficient, as between the Plaintiff and the Defendant, to discharge the express company from the performance of their agreement.

3. That there was no sufficient evidence to go to the jury, of any waiver of notice of non-payment, or notice of protest, on the part of Anna Saltus, one of the endorsers of the note.

To these three distinct propositions, the Defendant took a single exception, and it follows, that if any one of the propositions can be maintained, the exception is not well taken (Day *v.* Roth, 18 New York Rep. 448; Winchell *v.* Hicks, id. 558; Haggart *v.* Morgan, 5 New York, 422; Hunt *v.* Maybee, 7 ib. 266). The last of the three propositions was undisputedly correct. There is no evidence whatever in the case tending to show that Anna Saltus ever waived her rights as endorser of the note.

Whatever may have transpired between the maker and the other endorsers, affecting the rights of the latter, it is not pretended that Mrs. Saltus ever participated in, or had any knowledge of it. She was therefore entirely unaffected by the agreement, by which it is claimed the other endorsers waived notice of protest. Consequently, the Judge ruled correctly as to that part of the case, and the exception does not bring the other propositions under consideration.

Neither was there error in the refusal to charge that the Plaintiff could not recover, unless the jury should believe that the maker of the note was insolvent.

The evidence touching the maker's pecuniary condition was given by himself, and he frankly confessed that he had no means

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to pay his debts at that time, nor had he been able to pay this note in money, at any time since its maturity.

The particulars he gave of his condition, all went to show that he was insolvent.

There was no dispute about these facts sworn to, touching his inability to pay his debts, and there was no error in refusing to submit the question to the jury.

The judgment should be affirmed, with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THE PEOPLE, &c., ON THE RELATION OF JAS. R. DEL VECCHIO, APPELLANT, v. THE BOARD OF SUPERVISORS OF KINGS COUNTY, RESPONDENTS.

Mandamus—Appointment of County Papers by Boards of Supervisors.

Persons publishing and printing the laws, as provided by chapter 280 of the Laws of 1845, are not entitled to compensation therefor unless they have been appointed, by the Supervisors of the county, printers to so publish and print the laws.

P. S. Crooke for Appellant.
R. H. Huntley for Respondents.

DAVIES, CH.J.—The Relator applied to the Supreme Court for a peremptory writ of mandamus, commanding the Respondents to audit and pay a bill of $139.50 for printing and advertising tax sales in said county. The return to the alternative writ states, that the Board of Supervisors of the County of Kings did not, on the first day of August, 1860, nor on any other day during said year, designate the Standard (a newspaper published in said county by the Relator), as one newspaper to publish and print the laws as provided by chap. 280 of Laws of 1845.

That said Board of Supervisors, at their annual meeting held on said first day of August, 1860, did appoint two printers to publish the laws of a local and general nature, in two newspapers published in said county of Kings, as provided by chap. 280 of the Laws of 1845, and that the two newspapers so appointed were designated by said Board, at said meeting, as the Brooklyn Daily Eagle and the Brooklyn Daily Times; and that such appointment and designation were made as follows, to wit: That at said meeting of said Board of Supervisors a resolution was offered and adopted in these words: "Resolved, that the Board now proceed to ballot for a choice of the newspapers in which shall be published the laws affecting this county to be passed at

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the next session of the Legislature." That upon the passage of said resolution the chairman of said Board appointed two Supervisors as tellers to receive the ballots which should be cast. That a balloting was then had, of which the tellers announced the result as follows, to wit:

That the number of ballots received was 24, of which 22 ballots contained each two names, one contained one name, and one was blank, and the vote was as follows, to wit:

For the Brooklyn Daily Eagle	16 votes.
For the Brooklyn Daily Times.....	14 votes.
For the Brooklyn Evening Star.....	12 votes.
For the Brooklyn City News.....	2 votes.
For the Standard.	1 vote.
For Blank.....	1 vote.

That the ballot containing a single name was for the Standard. That thereupon a member of said Board of Supervisors moved that the "Eagle" and "Times" be declared to be the two newspapers designated by said ballot to print and publish the laws affecting said county, which motion was adopted, no opposition thereto appearing on the minutes of said Board. That the mode above stated of designating two newspapers for publishing the laws had been before adopted and made use of by said Board, and that two newspapers were designated in the same manner the previous year, to wit, at the annual meeting of said Board, held on the 2d day of August, 1859; the Relator, James R. Del Vecchio, being then a Supervisor of said county, and present at said meeting, and participating and acting as teller in the designating and appointing of two newspapers for the aforesaid purpose, and in manner aforesaid. That in pursuance of the said designation and appointment, made on the first day of August, 1860, as aforesaid, the Comptroller of the State of New York, in or about the month of June, 1861, prepared for the county of Kings, and for publication in said papers, the Brooklyn Daily Eagle and the Brooklyn Daily Times, a notice of the sale of lands for taxes in Kings county, and caused such notice to be

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published in said newspapers, as required by chapter 427 of the Laws of 1855, § 61, and that said newspapers did thereupon publish said notice for the time and in the manner required by said statute. And that thereafter the proprietors of said newspapers did present their bills to said Board, duly verified; and said Board, at a regular meeting thereof, held on the sixth day of August, 1861, did audit and order the same to be paid, and the county treasurer of said county did, on the eighth and ninth days of August, 1861, pay to the publishers of said newspapers, "Eagle" and "Times," and to each of them, their respective bills of said publication, amounting to the sum of $139.50, each being for the same services for which payment is now claimed by the Relator. That the said Comptroller did not, nor did any person for him, prepare for publication, or request or cause to be published in the Standard, said notice or any notice of sale of lands for taxes, nor was the Relator, nor any of his agents or employés, requested or authorized to publish said notice; and that said notice was, without authority, copied into the Standard from the columns of the said "Eagle" and "Times," after the same had been published by them as before stated.

That the said Relator did not present his bill and claim for said advertising to said Board of Supervisors until after said bills of the "Eagle" and "Times" had been audited and paid as hereinbefore stated, to wit, not until the 19th day of August, 1861, although at the time said bills were presented, audited, and paid, he well knew the fact; nor did he, on the first day of August, 1861, or afterward, at any time object to the payment of said bills, nor claim that he had any demand against said Supervisors for said advertising until said 19th day of August, 1861; nor did he at any time previous to said last-mentioned day, claim or pretend that he was appointed printer, or that the Standard was designated or appointed by said Board of Supervisors as one of the newspapers to publish the laws as required by the statute hereinbefore referred to.

That for these reasons the Respondents had refused to audit said account of said Relator.

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To this return the Relator demurred, thereby admitting all the facts therein stated.

Judgment was given for the Defendants upon the demurrer, and the Relator now appeals to this Court.

It is difficult to see upon what ground the Relator can claim compensation for the publication of the notice, issued by the Comptroller of the State, and by him directed to be published in two newspapers in the county of Kings, and which was so published. The Relator was never employed to publish said notice, and by his demurrer to the return, he admits that said notice was published by him without authority, and copied by him from the columns of the "Eagle" and the "Times," after the same had been published by those papers.

Section 61 of chapter 427 of Laws of 1855, makes it the duty of the Comptroller of the State to give notice of certain tax sales in the manner therein provided, "in the newspapers designated by the Board of Supervisors of such counties respectively to publish the session laws. . . . . The Boards of Supervisors of the respective counties shall audit and pay the expenses of such publication."

The Relator admits that he was never authorized, or requested by the Comptroller of the State, to publish this notice.

This action, therefore, was merely voluntary, and created no legal liability upon the Board to audit and pay his bill. He was merely a volunteer.

Neither can the Relator claim the right to publish the notice in his paper, and to demand compensation therefor on the ground that he had been appointed one of the printers to print the laws under the Act of 1845.

That act directs the Boards of Supervisors of the several counties of this State, at their annual meetings, to appoint the printers for publishing the laws in their respective counties.

It then provides the manner of making the appointment. The Board of Supervisors of Kings county did proceed to make such appointment, and did appoint and designate two newspapers printed in said county to publish said laws. If there was any

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irregularity in such appointment, or if the Relator was appointed as he claimed, he has not selected the proper mode for trying and settling those questions.

The appointment of the newspapers designated cannot be thus inquired into collaterally. The Relator, if he claimed to have been appointed or designated as one of the newspapers, should have instituted the proper proceeding to have tested that question. He should not have lain by and permitted others to enter upon the discharge of the duties of an office to which he claims to have been appointed, and thus subject the county to expense to such persons for the discharge of those duties. But it is very clear that the Relator, upon the facts stated in the return, never was appointed or designated as one of the printers within the meaning of the Act of 1845. It is apparent that the Supervisors did not observe the precise directions of the statute.

They did designate two newspapers to publish the laws, although not in the manner pointed out. This manner may be held directory as to form, if the substance of the Act was complied with. The balloting may be regarded as informal, but the resolution of the Board declared the result, and that could only be changed by a direct proceeding for that purpose.

Under no view of the facts can the Relator claim to have been appointed or designated as one of the papers.

It is to be borne in mind that the Board were to appoint two printers.

To attain this, each Supervisor was to vote for one, and the paper having the highest number of votes, and that having the next highest number of votes, "shall be the papers designated for printing the laws." It is thus seen that it was essential to an election that two papers were to be voted for at the same time. Two were to be chosen, appointed, or designated by the same act. Each Supervisor was restricted to voting for only one, and it may be conceded that all the ballots having more than one paper named thereon were void. It follows, therefore, that the only legal ballot cast was for the paper owned by the Relator. But one Supervisor alone voting could not make the appointment.

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The Act clearly contemplates and requires that more than one vote shall be cast.

Two papers are to be appointed by one and the same process. No voter can vote for more than one paper. The paper having the highest number of votes, and the paper having the next highest number of votes, are to be the papers designated for printing the laws. It follows, therefore, at such an election, that at least three legal ballots must be cast, and that to make an appointment, one paper must have two, and another paper one. This is the least possible number of legal votes which can be voted, to make an appointment in compliance with the provisions of this Act.

Now, if the Relator's position be correct, there was but one legal vote cast at this election. If so, it conclusively follows that no appointment was made at that meeting of the Board, and it also clearly follows that the Relator, or his paper, was not appointed or designated. No one of two or more papers received the highest number of votes, and no paper received the next highest number of votes; consequently, no two papers could be designated for printing the laws.

In whatever aspect, therefore, we regard the Relator's claim for compensation for publishing the notice in question, we are unable to discover any legal ground for enforcing it.

Without discussing the question whether a mandamus was the proper remedy to compel payment of this demand, we are of the opinion that the judgment refusing to award it was correct, and should be affirmed with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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ELIJAH B. ALLEN AND WALTER B. ALLEN, APPELLANTS, v. NORMAN SACKRIDER AND FRANK FARNHAM, RESPONDENTS.

Common and Special Carriers—Distinction defined.

Where a person, being the owner of a sloop, and not engaged in public transportation, is specially employed to transport a cargo of wheat from one port to another, he is not to be deemed a *common carrier*, but only a *special carrier*, and he is not to be held to the strict accountability of a common carrier.

The distinction between a common and a special carrier defined and commented upon by Parker, J.

PARKER, J.—The action was brought against the Defendants, to charge them, as common carriers, with damage to a quantity of grain—shipped by the Plaintiffs in the sloop of the Defendants, to be transported from Trenton, in the province of Canada, to Ogdensburgh in this State—which occurred from the wetting of the grain in a storm.

The case was referred to a referee, who found as follows: "The Plaintiffs, in the fall of 1859, were partners doing business at Ogdensburgh. The Defendants were the owners of the sloop Creole, of which Farnham was master. In the fall of 1859 the Plaintiffs applied to the Defendants to bring a load of grain from the bay of Quinte to Ogdensburgh. The master stated that he was a stranger to the bay, and did not know whether his sloop had capacity to go there. Being assured by the Plaintiffs that she had, he engaged for the trip at three cents per bushel, and performed it with safety. In November, 1859, Plaintiffs again applied to Defendants to make another similar trip for grain, and it was agreed upon at $100 for the trip. The vessel proceeded to the bay, took on a load of grain, and on her return was driven on shore, and the cargo injured to the amount of $1,346.34. That the injury did not result from the want of ordinary care, skill, or foresight, nor was it the result of inevitable accident, or what in law is termed the act of God. From these facts, my conclusions

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of law are, that the Defendants were special carriers, and only liable as such, and not as common carriers; and that the proof does not establish such facts as would make Defendants liable as special carriers, and therefore the Plaintiffs have no cause of action against them."

The only question in the case is, were the Defendants common carriers?

The facts found by the referee do not, I think, make the Defendants common carriers. They owned a sloop, but it does not appear that it was ever offered to the public, or to individuals, for use, or ever put to any use except in the two trips which it made for the Plaintiffs, at their special request. Nor does it appear that the Defendants were engaged in the business of carrying goods, or that they held themselves out to the world as carriers, or had even offered their services as such. This casual use of their sloop in transporting Plaintiffs' property falls short of proof sufficient to show them common carriers.

A common carrier was defined in Gisbourn *v.* Hurst (1 Salk. 249) to be "any man undertaking for hire to carry the goods of all persons indifferently;" and in Dwight *v.* Brewster (1 Pick. 50), to be "one who undertakes for hire to transport the goods of *such as choose to employ him*, from place to place." In Orange Bank *v.* Brown (3 Wend. 161), Ch. J. Savage said:—"Every person who undertakes to carry, for a compensation, the *goods of all persons* indifferently, is, as to the liability imposed, to be considered a common carrier." "The distinction between a common carrier and a private or special carrier is, that the former holds himself out *in common*—that is, to all persons who choose to employ him—as ready to carry for hire, while the latter agrees in some special case, with some private individual, to carry for him" (Story on Contracts, 752 *a*). The employment of a common carrier is a public one. He assumes a public duty, and is bound to receive and carry the goods of any one who offers. "On the whole," says Professor Parsons, "it seems to be clear that no one can be considered as a common carrier unless he has in some way held himself out to the public as a carrier in such

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manner as to render him liable to an action if he should refuse to carry for any one who wished to employ him" (2 Pars. on Con. 166, note, 5th ed). The learned counsel for the Appellants, in effect, recognizes the necessity of the carrier holding himself out to the world as such, in order to invest him with the character and responsibilities of à common carrier, and to meet the necessity, says: "The Creole was a freight vessel, rigged and manned suitably for carrying freight from port to port; her appearance in the harbor of Ogdensburgh, waiting for business, was an emphatic advertisement that she sought employment."

These facts do not appear in the findings of the referee; and therefore cannot, if they existed, help the Appellants upon this appeal.

It is not claimed that the Defendants are liable, unless as common carriers. Very clearly they were not common carriers, and the judgment should therefore be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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ISAAC N. PHELPS v. GEORGE VAN DUSEN.

Lease—Assignment—Covenant to pay Rent.

The assignment of a lease to a third party, after a portion of the rent thereon has become due, does not discharge the lessee from his covenant to pay rent due to the lessor.

S. C. H. Bailey for Appellant.
Terwilliger & Hasford for Respondent.

GROVER, J.—None of the objections to the introduction of the lease in evidence were well taken. The proof of its execution by the Defendant was sufficient, and if not, the fact was afterward proved by the Defendant. The lease was properly described as a lease of two years, although extended by virtue of a covenant therein contained for an additional period of three years, at an increased rent.

The rent claimed in this action accrued prior to the assignment of the lease by the Defendant to Benjamin & Co. Besides, the Defendant expressly covenanted to pay the rent to the Plaintiff, and the action is upon the covenant. The assignment of the lease to Benjamin & Co., and the acceptance of rent subsequently by the Plaintiff from them, did not discharge the Defendant from his covenant to pay the rent (Port v. Jackson, 17 John. 239; same case in error, id. 479).

The judgment appealed from must be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THE CHATHAM BANK, RESPONDENT, v. FREDERICK B. BETTS, APPELLANT.

Promissory Note—Usury—Bonâ fide Holder.

It is not usurious for an agent of the maker of a promissory note, or one acting as such, to procure the note of his principal to be discounted at a lawful rate of interest, and, without any agreement to that effect, to return a portion of the proceeds of such note, paying over the balance.

Whether the agent discounted the note for his principal at a usurious rate before procuring it to be discounted at the bank is a question of fact to be ascertained by the jury, and not to be assumed by the Court on a trial before a jury.

Ira D. Warren for Appellant.
E. W. Chester for Respondent.

DAVIES, CH.J.—The Plaintiff discounted a promissory note made by the Defendant, payable to the order of A. A. Thomas, and endorsed by him and one Samuel B. Potter. The note was presented at the bank before maturity, by Potter, and discounted by the bank, and the proceeds passed to his credit. The defence was:

1. That Potter was the real party in interest, having paid the amount of the note to the Plaintiff.

2. That the note was an accommodation note made for the benefit of Thomas, for the purpose of enabling him to raise money. That Thomas delivered it to Potter, upon a corrupt and usurious agreement that Potter should reserve to himself, for the loan of money thereon, a greater sum than seven per cent. per annum, to wit, a little over 25½ per annum. That said Potter did receive for the loan of the amount of said note, for the space of three months, the sum of one hundred and fifty dollars.

The Judge, among other things, charged the jury that the main question for them to determine was, whether at the time of the negotiation between Thomas and Potter, in regard to the note, there was an unlawful usurious agreement made respecting the

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discount of the note. If Mr. Potter agreed to discount the note at 2½ per cent. a month, and did discount it, deducting at that rate, or $150 for three months, such a contract would be void in the hands of the Plaintiff. The mere fact of Mr. Potter retaining in his hands $150, without any agreement on the part of Thomas and Potter that that should be the interest or compensation for the loan, would not of itself render the transaction usurious. If there was such an agreement between Mr. Potter and Mr. Thomas respecting the discount of the note, then the fact that the bank had discounted the note for Mr. Potter at the rate of 7 per cent. per annum would not render the note good in the hands of the bank, because in that case it would have passed from Mr. Thomas to Mr. Potter under a usurious contract. If the jury found there was such a usurious agreement between Thomas and Potter, then the Defendant would be entitled to a verdict. If there was not such a usurious agreement, notwithstanding all the other facts might be true, which had been proved, the Plaintiff would be entitled to a verdict for the amount of the note and interest. To this charge no exception was taken by either party. The Court also charged, that if Mr. Thomas parted with the note to Mr. Potter, upon a usurious agreement as to the rate of interest, it was then usurious and void in any person's hands.

To this portion of the charge the Plaintiff's counsel excepted.

The Defendant's counsel then requested the Court to charge the jury that the facts in the case, as they are disclosed by the evidence, render the note usurious and void, and the Defendant is entitled to a verdict. The Court refused so to charge, and the Defendant's counsel excepted.

The jury found a verdict for the Plaintiff, and the Court refused to grant a new trial, and judgment was affirmed on appeal.

The exception to the refusal to charge as requested by the Defendant, presents the principal question for the consideration of this Court upon this appeal. Upon the testimony adduced upon the trial, it is clear that Potter acted as the agent of Thomas and Betts, in procuring the discount of the note by the Plaintiff. It is equally clear that the bank discounted it at a lawful rate of in-

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terest, and passed the proceeds of the note to the credit of Potter, who was a dealer with the bank, and kept an account there. The circumstance that Potter did not pay over to Thomas and Betts the whole sum he received from the bank on the discount of the note, does not impair or impeach its title, nor does it tend in any degree to show that the bank made a corrupt and usurious agreement upon the discount of the note.

The only ground of defence set up was, that Potter had discounted the note upon an usurious and corrupt agreement before he transferred it to the bank, and though the testimony failed to establish that defence, yet there was sufficient in the testimony, on the part of the defence, to send the case to the jury. If it had not been discounted by Potter before he transferred it to the bank, there was no pretence of any defence to the note in the hands of the bank. If it had been so discounted by him, then the note was void in the hands of Potter, and he could not have transferred a good title to the bank. If the Judge had, therefore, directed the jury to find a verdict for the Defendant, he must necessarily have withdrawn the question from their consideration, and this would have been error. It was not erroneous, therefore, to refuse to instruct the jury, as requested, to find a verdict for the Defendant.

The case of Van Duzer v. Howe (21 N. Y. 531), is like the case at bar. There this Court held, that when the drawer of a bill of exchange for $1200, paid $50 to an accommodation endorser for endorsing it, and procuring another endorser, and obtaining its discount, the draft was not affected by the usury, and that the bonâ fide holder could recover thereon. The same state of facts exists in the present case, and the exception to the refusal to charge that the Defendant was entitled to a verdict, is untenable.

The conversation between the witness Potter and the cashier of the Plaintiff, at the time he presented the note for discount, was wholly unimportant to any issue in the case. What the cashier said had no significance, and was wholly immaterial to the issue submitted to and passed upon by the jury. It therefore

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worked no injury to the Defendant, and the exception taken to its admission affords no ground for a reversal of the judgment, and granting a new trial.

Judgment should be affirmed, with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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HORATIO N. CURTIS, APPELLANT, v. SIMON BUTTS, RESPONDENT.

Ejectment—Evidence of Paramount Title—Description of Lands—Variance.

A mere probability is not enough to enable the Plaintiff to take the premises in dispute from the Defendant, who holds by a conveyance from the same grantor, and which unquestionably embraces the same premises. The Plaintiff must establish his title affirmatively.

H. & G. H. Humphreys for Appellant.
L. Farrar for Respondent.

DAVIES, CH. J.—The Plaintiff in his complaint claims to recover ninety-five acres of land, occupied by the Defendant, described as the south half of the west 200 acres of lot No. 34, township No. 2, except five acres on the south-west corner of the said south half of said West 200 acres, and of which the said Plaintiff claimed to be the owner.

The Plaintiff claimed title as deduced from a deed from William Adams to John Love, in which deed the premises were described as lands lying in township No. 2, short range, west of Genesee river, and, a witness on the trial thought, the west part of the lot. This was the testimony of Samuel Owen, the grantee in the next link of the Plaintiff's chain of title.

This was a deed from John Love and his wife to Samuel Owen, conveying all that certain piece or parcel of land situate, lying, and being at the mouth of the Genesee river, on the west side, lying in township No. 2, in the short range, in the district of Northampton, and is the one undivided half of 200 acres of land, as conveyed to the said party of the first part by Doctor William Adams, of Geneva, in the county of Ontario.

The Defendant claims under a deed from the same John Love and wife, dated January 10, 1834, and recorded April 17, 1839, granting and conveying all that certain piece or parcel of land situate, lying, and being in the town of Greece, county of Monroe,

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and State of New York, being two hundred acres of the west side of lot (34) thirty-four, in the first section of township number two (2), in the short range, west of the Genesee river.

It is conceded that this deed contains a concise, accurate, and correct description of the lands in question, and under it the Defendant was in possession of the premises in controversy.

The Plaintiff seeks to eject him therefrom, and deduces title from the same John Love, by means of a deed which does not describe the premises in controversy.

The Plaintiff has to recover upon the strength of his own title, and cannot upon the weakness of that of his adversary.

We agree with the Supreme Court, "that it is impossible, from the description in this deed, or from the description contained in any referred to in this deed, for any one to say that the land in question is the land granted or intended to be granted by it to Samuel Owen."

The deed does not locate the land conveyed by it in lot No. 34, or as a part of that lot. It only locates it as being at the mouth of the Genesee river, on the west side thereof, and is further described as being the one undivided half of 200 acres of land, as conveyed to Love by Dr. William Adams, of Geneva, in the county of Ontario. The Plaintiff, to aid the construction to be given to this deed, introduced a partition deed, made between Sir William Pultney and several others, whereby there was set off to John Love, 200 acres on the west end of lot No. 34, in the first division of lots. One William Adams was a party to this partition deed, but it is very clear that this deed is not the one referred to by Samuel Owen and William Love, in their testimony.

The partition deed is dated October 4, 1804. The deed of William Adams to John Love for 200 acres, being at the mouth of the Genesee river, being for the same premises conveyed by Love and wife to Owen, must have been given at least four years before the partition deed was made and executed.

William Love testifies that William Adams was the father of his mother; that his grandfather resided with his father and mother at Salina, Onondaga county. That he recollected when his

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grandfather made out the deed; he went to Onondaga Hollow to get it drawn and acknowledged, and when he came home his grandfather showed it to him.

This was in 1800. That his grandfather read part of it to him, and said to him that when he became a man the property would come to him; it was to belong to his father and mother during their natural lives, then it was to fall to him, he paying the other children a certain sum.

That it was for a part of an undivided tract of land conveyed to his grandfather by Oliver Phelps.

Owen testified that after he made the bargain for the land, and they were going off to get it executed by a deed from John Love, William Love showed him a deed his father had from Dr. William Adams to John Love; it was a deed that they talked of in the neighborhood. "They took the deed that day or the next, and went to Onondaga Hollow, and had a deed executed to me from John Love and his wife *from that deed.*"

We therefore can trace back the precise premises from the deed of Love to Owen, conveyed by Adams to Love, and by Phelps to Adams. These were a piece or parcel of land situate, lying, and being at the mouth of the Genesee river. Now, by one inspection of the map annexed to the partition deed, is seen that lot No. 34 (the locus in quo) is three or four miles from the mouth of the river, and nearly in the centre of the township.

The vagueness and uncertainty in the description of the premises intended to be conveyed by Love to Owen, are not helped by the partition deed.

As was well remarked by Judge Johnson in the opinion of the Supreme Court, "There is nothing to show certainty that the lands set off and allotted to Love in severalty in that partition, were the lands conveyed to Love and wife by Dr. William Adams.

"A mere probability is not enough to enable the Plaintiff to take the premises in question from the Defendant, who holds them by a conveyance from the same grantees, which unquestionably embraces them.

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"It was for the Plaintiff to establish this fact affirmatively."

This clearly he failed to do, and in the view we take of the testimony adduced on the trial, the Supreme Court put the case more favorably for the Plaintiff than the evidence warrants.

It seems to us that this view of the facts demonstrates that the deed from Adams to Love, and the deed from Love to Owen, did not convey the same premises as those partitioned and set off by the partition deed to Love, and by him conveyed to Peter and John P. Bush, jun., and from whom the Defendant derives his title:

1. It is undeniable that the description and location of the premises are essentially different.

2. Adams' deed to Love of the 200 acres at the mouth of the Genesee river, was made and executed four years before the 200 acres on the west end of lot No. 34 were partitioned and conveyed by the partition deed to John Love.

3. It appeared that the land conveyed by Adams to Love had been conveyed by Oliver Phelps to Adams.

Now there is not a scintilla of evidence in the case that the 200 acres conveyed by the partition deed to Love had ever been owned by Phelps, or that he had ever conveyed or assumed to convey the same to Adams.

There is a total failure to identify the premises conveyed by Phelps to Adams, and by Adams to Love, and by Love to Owen, as the same premises set off, partitioned, and conveyed by the partition deed to Love, and by the latter to the Bushes, and from them by sundry conveyances to the Defendant, as one and the same parcel of land.

On the contrary, the inference is strong that they were different.

It was fundamental to the Plaintiff, to establish his right to recover, to show their identity. Not having done so, it could not be said that he had shown title to the premises conveyed to and occupied by the Defendant.

Upon this testimony the Court properly instructed the jury to

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find a verdict for the Defendant, and the judgment upon that verdict should be affirmed, with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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ROBERT HOGAN v. AZOR HOYT AND OTHERS, ON THE APPEAL OF HORACE DRESSER AGAINST FAUSTO MORA, THE PURCHASER, RESPONDENT.

Foreclosure—Practice—Judgment and Report of Sale—Amendment nunc pro tunc.

The judgment of foreclosure and the report of sale are proceedings in the same Court, which has authority to amend its proceedings, including its order of sale at any time, nunc pro tunc.

A motion to amend the order of sale after the premises had been sold by the Sheriff of the county, so that it should read, "that the premises to be sold by the Sheriff, &c.," instead of, "by A. B., referee," &c., is in the discretion of the Court.

APPEAL from an order of the Supreme Court, directing the amendment of the judgment of foreclosure under which the Respondent purchased, by substituting the name of the Sheriff of the city and county of New York, who made the sale, in place of that of Livingston K. Miller, the referee, who was designated for that purpose in the original decree.

The material facts were as follows, as disclosed by the papers in the Court below:

In Dec., 1850, the Defendant, Azor Hoyt, executed a mortgage to the Plaintiff for $4,600, covering the premises known as No. 239 West Twenty-third street, in the city of New York. In August, 1851, the mortgagor conveyed the premises to the Appellant Dresser. In 1854 a foreclosure suit was commenced against Hoyt and Dresser, which resulted in a judgment of foreclosure, in Jan. 7, 1855, authorizing a sale of the premises by L. K. Miller, as referee.

In March, 1855, at the request of the Appellant Dresser, Antonio M. Mora and Jose A. Mora purchased the judgment in this action, and another foreclosure judgment in favor of Charles A. Davison; and in August, 1856, they caused the premises to be advertised for sale by James C. Willett, who was then Sheriff of New York. He sold them, pursuant to this advertisement, in

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Sept., 1856, and they were purchased by the Moras, to whom, in October following, he delivered the usual Sheriff's deed.

In February, 1859, the Moras moved for the correction of certain mistakes connected with the Sheriff's sale, and the Appellant Dresser moved to vacate the proceedings, on various grounds, one of which was the inadequacy of price at the sale. The report of the Sheriff was amended and confirmed, and the motion of Dresser was denied. Both orders were affirmed on appeal to the General Term. The Moras entered into possession of the premises, which they afterward sold to other parties, and, through divers mesne conveyances, the title was acquired by Fausto Mora, the present Respondent.

In 1864 he contracted to sell the property to another party, who objected to receiving a conveyance on discovery of the fact that the sale made by the Sheriff was directed in the decree to be made by a referee.

To obviate this objection, the Respondent moved for an amendment of the judgment of foreclosure, by substituting for the name of Livingston K. Miller, referee, that of the Sheriff of the city and county of New York, by whom the sale was actually made. The Appellant opposed the motion, mainly on the same grounds on which his previous motion had been denied. The application was heard and granted at Special Term by Mr. Justice Foster, and his decision was unanimously affirmed at the General Term.

John H. Reynolds for Appellant.

William F. Allen and *C. H. Van Brunt* for Respondent.

PORTER, J.—The Appellant is mistaken in supposing that the judgment of foreclosure and the report of sale are not "proceedings" in the Court below. The authority of that Court to amend them, nunc pro tunc, is too clear to be open to discussion, either here or elsewhere (Code, § 173).

The question was one addressed to the discretion of the Supreme Court; and no facts appear in the papers to invest an appellate tribunal with authority to reverse its decision. We are bound to assume that the sale was fairly made, for that was settled

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in the Court below, by an adjudication at the General Term, in which the Appellant acquiesced. The question, whether the sale should be made by the Sheriff or a referee, was one which rested in judicial discretion. The legal presumption is that it was honest and fair. In either case it was made by a responsible officer, under the immediate supervision of the Court, by which it was approved on a hearing of all the parties.

There is no force in the objections that the Complainant, Hogan, is dead; that the action has not been revived; and that Fausto Mora, the purchaser, was not a party to the suit in which the motion was made. We had occasion to consider these questions in the case of Sawyer *v.* Hubbell, decided at the last term, and our conclusions were in accordance with the views now maintained by the Respondent.

The Appellant, who acquiesced in a sale by the Sheriff, could take no more effectual means to quiet the fears of a purchaser; and he is not in a position now to avail himself of an afterthought, by opposing technical cavils to the rights of a vendee who bought in perfect good faith. The Court below was clearly right in its decision, and its order should be affirmed, with costs, as upon a special motion.

All the Judges concurring,

Judgment accordingly.

JOEL TIFFANY,
State Reporter.

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HENRY MACKANESS PROWITT AND OTHERS, RESPONDENTS, v. WASHINGTON RODMAN AND OTHERS, APPELLANTS.

Will—Devise—Remainder—Issue—Children and Grandchildren.

The testator gave certain property to his daughter, Mrs. Prowitt, during her life, and, after her death, "to such children as should be living at the time of her death." Held, under the circumstances of the case, that this expression was not limited in its effect to the immediate offspring of Mrs. Prowitt, but included remoter descendants or grandchildren.

The expression "children then living" may mean "lawful issue," or remoter descendants, if such was the intention of the testator, to be gathered from other parts of his will. In the case of a contingent future gift to the children of a first taker, followed by a limitation over for want of such, the presumption is in favor of the first taker's posterity, to his remoter descendants, in preference to the donee over.

THIS action was commenced to obtain a judicial construction of the will of Thomas Mackaness, which bore date of February 15, 1806. The testator died prior to March 19, 1807, the will having been proved on that day, in the county of Orange. His wife died before him.

He left three daughters: Elizabeth, then the wife of Thomas Harvey; Mary, then the wife of Mr. Prowitt; Margaret, then unmarried, afterward the wife of Charles Ludlow.

At the death of the testator Mrs. Harvey had two children living, and Mrs. Prowitt had three.

Mrs. Mary Prowitt outlived both of her sisters. She also outlived all her children, but left grandchildren and great-grandchildren. She died in 1857.

One daughter of each sister survived Mrs. Prowitt. The questions arise upon the claims of the descendants of these children, as against the descendants of Mrs. Prowitt.

The case was tried at the Special Term, where judgment was rendered in favor of Mrs. Prowitt's descendants, and adversely to the Defendants, Mary Rodman and others, and adjudging costs to all parties out of the fund.

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The General Term of the First District affirmed the judgment, and the representatives of Mary Rodman now appeal to this Court.

In the introduction to his will, the testator gives his soul to God in Christ, and adds: "And, as to such worldly estate and effects wherewith it has pleased God to bless me, I give, devise, and bequeath the same in manner following:"

In the first clause he gives to his daughter, Elizabeth Harvey, during her life, certain premises, situate on Front and Depeyster streets in the city of New York, and after her decease, to such child or children as she may then have living; if none, or after their death, to her husband for life, with remainder over to his daughter Mary and his daughter Margaret, in equal parts.

He then proceeds (omitting superfluities) as follows:

"Secondly:—I give unto Thomas Harvey, Divie Bethune, and John Huyler, and their heirs, my lot of ground, with a brew-house and malt-house thereon, and all the fixtures and utensils belonging to the said brew-house and malt-house, to the use of said Harvey, Bethune, and Huyler during the life of my daughter Mary Prowitt, and upon the trusts that they, during the life of my said daughter Mary Prowitt, apply the rents and profits for her sole and separate use; and after the decease of my said daughter Mary Prowitt, to the use of all and every the child and children of my said daughter Mary Prowitt, lawfully to be begotten, then living; if one child only, to him or her the whole, and to his or her heirs and assigns forever; and if more than one child, then to them, their heirs and assigns forever, in equal parts to be divided; and to the several and respective heirs of the body and bodies of all and every such child or children lawfully issuing, and to, for, or upon no other use, trust, intent, or purpose whatsoever; and I do accordingly, from and immediately after the decease of my said daughter Mary Prowitt, give and devise, all and singular the lots of ground, houses, with all the fixtures, utensils, &c., so as aforesaid given and devised in trust for her sole use and benefit, during the term of her life, unto such child or children as my said daughter Mary Prowitt shall then have

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living; if one child only, to him or her the whole, and to his or her heirs or assigns forever; and if more than one child, then to them, their heirs and assigns forever, in equal parts to be divided; and in case any such child or children should happen to die before the decease of their said mother, leaving lawful issue, then I do give and devise the part or parts of such child or children so dying unto the several and respective heirs of the body and bodies of all and every such child and children lawfully issuing, and to their several and respective heirs and assigns forever, in equal parts to be divided; provided, that it shall be lawful for said Harvey, Bethune, and Huyler, from time to time during the life of my daughter Mary Prowitt, and after her decease, during the minority of the child or children of my said daughter Mary Prowitt, or who, for the time being, shall by virtue of this my will be entitled in possession to the said lots of ground, or to receive and take the rents, issues, and profits thereof, or of any part thereof, by indenture, under hand and seal, to demise the said lot of ground, &c., for any term during the life of my said daughter; and in case my said daughter should die during the minority of her children or child, then for any term during such minority; and in case my said daughter Mary Prowitt shall not leave a child living at the time of her death, then I give and devise all the said real estate or property so given and devised in trust for her use and benefit during her natural life, and to her children or child after her decease, to my daughter Elizabeth Harvey, and my daughter Margaret Thornton Mackaness, their heirs and assigns forever, in equal parts to be divided; but if either of my said two last-named children shall then be dead, and shall have a child or children then living, the part of her so being dead I give and devise to such child or children; if one only, to him or her, and to his or her heirs or assigns forever; and if more than one, then to them, their heirs and assigns forever, in equal parts to be divided."

In the third section of his will, the testator gives to his wife and his daughter Margaret, for life, his farm, with all the stock and utensils thereon.

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He then makes the following bequest to his daughter Margaret:

"Fourth:—I give unto my said daughter Margaret Thornton Mackaness, her heirs and assigns forever, my house and lot, No. 32 Partition street, in the city of New York; but if my said daughter Margaret shall die unmarried, and without leaving a child her surviving, then I give the same and also all such other parts of my real and personal estate as by this my will are given to her, to my daughters Elizabeth Harvey and Mary Prowitt, their heirs and assigns forever, in equal parts to be divided; but if my said daughter Margaret shall die either before or after my decease, leaving lawful issue, then I do give, devise, and bequeath the part and parts, share and shares of my real and personal estate by this my will given, devised, and bequeathed to her, unto such child or children; if one only, to him or her solely, and his or her heirs and assigns forever; if more than one, to them, their heirs and assigns forever, equally to be divided between them, share and share alike; and in case my said daughter Margaret Thornton Mackaness shall die without lawful issue, and if, at her death, either of my said daughters, Elizabeth Harvey and Mary Prowitt, shall then be dead, and shall have a child or children then living, I give, devise, and bequeath the part or parts, share or shares of my real and personal estate, by this my will devised and bequeathed to their respective mothers so being dead, to such child or children; if only one, to him or her the whole, and to his or her heirs and assigns forever; and if more than one, to them, their heirs and assigns forever, in equal parts to be divided."

In the eighth section he gives to his daughter Elizabeth Harvey five thousand dollars; to his grandson, Thomas M. Harvey, two thousand five hundred dollars, and twelve hundred and fifty dollars to the same trustees before-named, to invest, receive the interest, and pay the same to Mrs. Prowitt, towards the better education and maintenance of her children until they became of the age of twenty-one years or married, whichever should first happen; and as the children severally "shall become of age or marry, as aforesaid, pay to such children, if more than one shall arrive at such age or marry, their several and respective equal proportions

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of the said principal sum of twelve hundred and fifty dollars, and all the interest that may then be due thereon; but if one only, then the whole of said sum to him or her."

In the same article the testator gives his wife the use of fifteen thousand dollars during her life, and after her death gives five thousand dollars thereof unto each of his daughters Elizabeth and Margaret.

The remaining five thousand dollars is placed in the hands of the same trustees, to invest and pay the interest to Mrs. Prowitt during her life, "and after her decease then to pay the said sum of five thousand dollars, and all the interest that may at her decease be due thereon, unto and amongst such children or child as my said daughter [Mrs. Prowitt] may have living at the time of her death, in equal parts to be divided, as they shall severally arrive at the age of twenty-one years or marry, whichever shall first happen; and in case my said daughter Mary Prowitt shall die during the minority of her children or child, then I direct that the said sum shall by my said trustees be kept at interest, and such interest applied towards their maintenance and education until they severally arrive at the age of twenty-one years or marry; and that the said principal sum of five thousand dollars, and the interest due thereon, be equally divided between and paid to the said children or child of my said daughter Mary Prowitt, as they shall severally attain the age of twenty-one years or marry; and if one only of such children arrive at the age of twenty-one years or marry, then to him or her solely, his, her, or their executors, administrators, and assigns forever; but if either of my said children shall, at the time of the death of my said wife, be dead, and shall have a child or children then living, the part or share of the said fifteen thousand dollars so bequeathed for the use and benefit of her so being dead, I give unto such child or children; if only one, to him or her the whole; and if more than one, to and among them in equal parts to be divided, and to his, her, and their executors, administrators, and assigns forever; and my said executors shall place out at interest or invest three thousand seven hundred and fifty dollars, and receive

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the interest, and pay the same into the hands of my said daughter Mary Prowitt, during her life, for her own use. And after the decease of my said daughter Mary Prowitt, I give the said principal sum of three thousand seven hundred and fifty dollars to such child or children as the said Mary Prowitt may then have living; if one only, to him or her the whole; and if more than one, to and among them, in equal parts to be divided, and to his or her, and their executors, administrators, and assigns forever; but if my said daughter Mary Prowitt shall not have any child living at the time of her decease, then I give and bequeath the said principal sum of $3,750 to and among my other two children, Elizabeth and Margaret, in equal parts to be divided, their executors, administrators, and assigns forever; but if either of my said two last-named children shall then be dead, and shall have a child or children then living, the part or share of the one so being dead, I give and bequeath to her child or children; if one only, to him or her the whole; and if more than one, to and among them, in equal parts to be divided, and to his, her, and their executors, administrators, and assigns forever. And all the rest, residue, and remainder of my estate, real and personal, whatsoever and wheresoever, which I may die seized or possessed of, or entitled to, I give, devise, and bequeath, in manner following—that is to say: one equal fourth part to my said wife, her heirs, executors, administrators, and assigns forever; and one other equal fourth part I give unto my said daughter Elizabeth, her heirs, executors, administrators, and assigns forever; and one other equal fourth of the said residue I give unto my said daughter Margaret, her heirs, executors, administrators, and assigns forever. And the remaining one equal undivided fourth part I give unto said Harvey, Bethune, and Huyler, upon the trusts that they shall place the said fourth part out at interest, or invest the same and receive the interest thereof, and to pay the same into the hands of my said daughter Mary Prowitt, during the term of her life, and, after her decease, then to pay the whole of said fourth part, and all the interest that may at her decease be due thereon, unto and amongst such child or children as my

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said daughter Mary Prowitt may have living at the time of her death, their executors, administrators, and assigns forever, in equal parts to be divided, as they shall severally arrive at the age of twenty-one years or marry, whichever shall first happen; and in case my said daughter Mary Prowitt shall die during the minority of her children or child, then I direct that the said sum or sums shall by my said trustees be kept at interest, and such interest applied towards their, his or her maintenance and education, until they severally arrive at the age of twenty-one years or marry; and that the said principal sum, and the interest due thereon, be equally divided between and paid to the said children or child of my said daughter Mary Prowitt, as they shall severally attain the age of twenty-one years or marry; and if one only of such children arrive at the age of twenty-one years or marry, then to him or her solely, his or her or their executors, administrators, and assigns forever.

And I do hereby nominate, constitute, and appoint my said wife, Jane Mackaness, my said son-in-law, Thomas Harvey, and my friends, George Warner, sail-maker, and Robert Gosman, house-carpenter, executrix and executors of this my will."

Thomas H. Rodman for Appellants.
Charles O'Conor for Respondents.

HUNT, J.—The first question before us arises upon the provisions of the second section of the will. The original Defendant, Mary Rodman, claimed one-half of the real estate here described, as the sole surviving child of Elizabeth Harvey (one of the testator's daughters) living at the death of Mrs. Prowitt. The same claim is continued by her descendants, who have now become the Defendants in this action.

The Plaintiff, on the other hand, contends that Mrs. Prowitt, having survived her immediate offspring, her grandchildren took the remainder in fee simple, in the real estate described in the second section of the will. This is the precise proposition presented upon this branch of the case. The claim of the Appellants to the $5,000 bequeathed in the eighth section for the use of

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Mrs. Prowitt during her life, and after her death "to such children as should be living at the time of her death," is based upon the same idea as is the claim to the $3,750 described in the same section, and in nearly the same language.

The three propositions present the same general question of the right of grandchildren to take and hold an estate limited by the expression, "children living at the time of her death."

In the consideration of this question, as it arises under the second section of the will, certain qualifying expressions hereafter to be mentioned, it is supposed, may influence its decision. Upon the eighth section the question is more sharply presented, although I consider these expressions as affecting the construction of the entire will, wherever they may be found.

The first suggestion that arises upon the examination of this will, is the idea that the testator intended to make a disposition of all of his property.

After a pious ejaculation in behalf of his soul, he announces his intention to make a disposition of his "worldly estate and effects." After numerous specific dispositions, he closes his will by giving directions as to "all the rest and residue" of his property. The language includes all his estate, and all his effects. He did not intend to die intestate as to any part of it (Jackson v. Merrill, 6 John. R. 191; Finlay v. King's Lessee, 3 Peters, 379; Hogan v. Jackson, 1 Cowper, 306).

The next observation is, that the testator intended to make a reasonably equal disposition of his property between his three children.

As the value of the real estate given for the benefit of each daughter is not stated in the will, this theory is to some extent conjectural. So far as sums are named, they are equal, and there is nothing to indicate a preference for one daughter over her sisters, or an intention to give to one family a greater inheritance than to another. Mr. Harvey, the husband of one of his daughters, was appointed a trustee and named as one of his executors, while Mr. Prowitt, the husband of his daughter Mary, was evidently in low esteem with the testator, either from a want of

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affection for him, or from a distrust of his financial capacity. So far as can be ascertained, however, from the terms of the will, this feeling extended only to exclude Mr. Prowitt from all management of or interference with the portion of the estate destined for his wife; but not to the diminution of her portion to the slightest extent.

As to each daughter, he seems to have intended that she should have the benefit of one-third of his estate during her life, and that, after her death, the same share should go to the benefit of her family.

It may be observed, also, that the will was evidently drawn by a lawyer, but by one who did not apprehend the precise effect of the language he made use of, and who seems himself to have had a suspicion of the truth. In the absence of precise ideas, or of accurate language, he takes refuge in technicality and redundancy. Commonplace and technicality are curiously intermingled.

In illustration of this want of accuracy, as well as to show that the testator did not, in fact, intend to limit the property described in the second section to the immediate offspring of Mrs. Prowitt, but that the expression "children then living," meant her "lawful issue," I will here refer to some other expressions of the testator in the same section. After disposing of the property during the lifetime of his daughter Mary Prowitt, the testator gives it "to the use of all and every the child or children of my said daughter Mary Prowitt, lawfully to be begotten, then living." It is conceded in the case that Mary Prowitt had three children, all of whom had been begotten and born before this will took effect. It is conceded, also, that the expression, "to be begotten," does not, in law, cut off children theretofore begotten or born. Nevertheless, the expression is inaccurate, as the testator wished his property to be for the benefit of the offspring of his daughter, already begotten and born, as well as those thereafter to be begotten. The claim has been made in a case hereafter to be cited, that under such a clause, the trust would pass only to those begotten previously to the taking effect of the will, and was overruled in connection with the main question raised by the Appellants, both objections being held to be unavailing.

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A few lines further on the testator provides, that if more than one child remains to Mrs. Prowitt, "then to them, their heirs and assigns forever, in equal parts to be divided, and to the several and respective heirs of the body and bodies, of all and every such child lawfully issuing." A devise to the heirs and assigns as here first limited carries a fee-simple absolute, while a limitation to them and the heirs of their bodies, as secondly described, creates an estate tail. The two descriptions are used convertibly in the same sentence, and apparently with no idea of a difference in their meaning. This language here, as well as in the sentence commencing "and in case," which I will presently quote, was probably intended to express the idea, that the children not only —i. e., the immediate offspring of Mrs. Prowitt—but the several and respective heirs of the bodies of all and every such child or children, being the lawful issue of Mary Prowitt, should be takers.

The testator then adds, "and I do accordingly;" that is, as he had just recited, to the heirs of the bodies of Mrs. Prowitt's children, give, devise, &c., to such children as she shall then have living. Again, after reiterating that, upon the death of Mary Prowitt, the estate in trust is for such children as she shall then have living, the testator adds these words: "And in case any such child or children should happen to die before the decease of their said mother, leaving lawful issue, then I do give and devise the part or parts of such child or children so dying unto the several and respective heirs of the body of all and every such child lawfully issuing, and to their several and respective heirs and assigns forever." Here is repeated the same confusion between the heirs and assigns of the children and the heirs of their bodies. The writer was unconscious that the paragraph was anything more than an elaboration of what preceded it. In my judgment, it explains the intent of all the prior premises respecting the descent to the issue of Mrs. Prowitt, and effectually determines their character. It is a clear statement that the estate is not limited to the children of Mrs. Prowitt who shall actually be living at the time of her death—that is, to her immediate offspring—but that her "lawful issue" are the parties intended to take.

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It contemplates the death of some or all of the children of Mrs. Prowitt before her decease, and provides that their children should take the same benefit as would have been had by their parents if they had outlived Mrs. Prowitt. I think there is no basis for the argument of the Appellants, that this applies only to a case where some of Mrs. Prowitt's children have died leaving issue, and others have survived her. There is nothing to indicate such an intent, or to justify such a construction.

And again; before closing this section the testator, in providing that, upon failure of Mrs. Prowitt's issue, the estate should go to his remaining daughters, uses this language: "And in case my daughter Mary Prowitt shall not leave a child living at the time of her death, then I give and devise all the said real estate and property so given and devised in trust for her, and during her natural life, and to her children or child, after her decease, to my daughter Elizabeth Harvey, and my daughter Margaret," &c.

The testator here evidently supposes that when he leaves the estate to the child or children of Mary Prowitt, living at the time of her death, he makes the same disposition as if he had left it to his daughter Mary and her children. He uses the two expressions in the same sentence, and as meaning the same thing. He describes the estate "so given," as being in trust for Mrs. Prowitt during her life, and to "her children or child" after her decease.

This would include the remoter descendants of Mrs. Prowitt. So in the use of the language employed in the fourth section of the will, in which his daughter Margaret is provided for, the same want of precision in the use of the terms, and the same commingling of the different expressions to indicate the intended issue of his daughter, are to be found.

He devises to his daughter Margaret, her heirs and assigns, certain premises on Partition street, in the city of New York, adding, but if my said daughter should "die unmarried, without leaving a child her surviving," then to his daughters, Mrs. Harvey and Mrs. Prowitt. He adds: "But if my said daughter shall die

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either before or after my decease, leaving lawful issue," then I do give, &c., "unto such child or children;" and in case my said daughter Margaret shall die "without lawful issue," and either of my daughters Mary or Elizabeth shall be dead, then," &c. The limitation here first made is to "a child her surviving." In the same sentence immediately following, and referring to the same posterity, "lawful issue" is the expression used, and thirdly, "unto such child or children"—still indicating the same descendants. These three expressions are used to indicate the same offspring, and show that the testator used the three expressions convertibly.

It is impossible to avoid this conclusion. The influence of these considerations is not limited to the sections of the will in which the expressions occur.

They shed light upon the whole instrument. In my judgment, they afford very strong reason to believe that in all the dispositions of the will for the benefit of the children of Mary Prowitt, the $5,000, and the $3,750, as well as the real estate, the testator intended her lawful issue, and not her immediate offspring, as the objects of his bounty.

The terms of the second section, authorizing the trustees to lease the brewery property, also confirm this construction. It was made lawful for the said trustees to lease the said property "from time to time, during the life of my daughter Mary Prowitt, and after her decease, during the minority of the said child or children of my said daughter Mary Prowitt, *or who for the time being* shall, by virtue of this my will, be entitled in possession," &c.

Power is here given to have (1) during the lifetime of Mrs. Prowitt, (2) during the minority of her child or children, (3) during the minority of "who," or whosoever, for the time being, should be entitled in possession. This is but a fair construction of this provision. The word "or" is disjunctive, and applies to other objects than those already designated, to wit: the children of Mrs. Prowitt. Such persons must have been the remoter descendants of Mrs. Prowitt.

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In relation to the $5,000, it is to be observed that, unlike to the real estate, and unlike to the $3,750, there is no limitation over to any other branch of the family, in the event of the failure of the issue of Mary Prowitt. The language is, to pay the same "unto such children or child as my said daughter Mary Prowitt may have living at the time of her death, in equal parts to be divided, as they shall severally arrive at the age of twenty-one years or marry, whichever shall first happen." It was the intent of the testator not to die intestate as to any part of his property. I have already discussed the subject. Such intent comes strongly in aid of the Respondents' claim, that the terms made use of were intended by the testator to embrace the remote issue of Mrs. Prowitt.

Unless such is the construction, the testator died intestate as to that amount (Royle v. Hamilton, 4 Vesey, 439).

In any view of the language of this will, there is no such conflict between its different provisions as requires a determination that one part shall prevail over the other.

The first principle is, that all parts shall be made operative, if possible; and it is only when the provisions are in irreconcilable conflict, that it becomes necessary to say what part shall stand and what part shall fall. I think the testator intended that the remote descendants should be takers under the sections of the will which I have discussed, if there should be a failure of the immediate offspring of Mrs. Prowitt. The expressions child or children then living, or child her surviving, should be so construed as to carry out this idea. This construction is in harmony with the general intent of the testator, in harmony with good sense and sound principles of justice, and is supported by high authority.

In Hart v. Tulk (19 Eng. L. & Eq. 438, 443), the word "fourth" was construed as if it had been dropped, or as if written "schedule," to prevent apparent caprice and injustice, and to make the will sensible and reasonable.

The English statute enacts that the father and grandfather of every poor person shall relieve and maintain such person. In commenting on this statute, Blackstone says (1 Com. 449): "No person is bound to provide a maintenance for his issue, unless

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where the children are unable to work," using the expressions "issue" and "children" as synonymous, and both applying to grandchildren as well as to children.

Chancellor Kent says in his Commentaries (4 Kent's Com. 419, *b*): "Children as well as issue may stand, in a collective sense, for grandchildren, when the justice or reason of the case requires it."

Although arguing strenuously against extending the signification of these words, Mr. Jarman says (chap. 30 of his work on Wills, p. 138): "It should be observed, however, that in a considerable class of cases the word child or children has received an interpretation extending it beyond its more precise and obvious meaning, as denoting immediate offspring, and been considered to have been employed as nomen collectivum, or as synonymous with *issue* or *descendants;* in which general sense it has often the effect, when applied to real estate, of creating an estate tail." He adds: "Where this construction has prevailed, however, it has generally been aided by the context."

In the Earl of Tyrone *v.* Marquis of Waterford (1 De Gex, Fisher & Jones, R. 627), Knight Bruce, Ld.J., says: "The word 'children' is a flexible expression, and according to a correct use of the English language has more meanings than one. Authoritative writers, as well as the habits of educated society, show that an accurate speaker may, without impropriety, use the term 'children' for the purpose of indicating offspring, or descendants, or posterity, in whatsoever degree. If, therefore, in this will, we read the word 'children' as equivalent to 'issue,' or 'descendants,' we read it in one of the senses belonging to it, though not in that which is the most usual; nor are the instances few in which our Courts of Justice, construing testamentary dispositions, have so interpreted it. I agree that the word 'children,' when used in a will for the purpose of indicating relationship, and not age, must generally, or universally, in the absence of an explanatory context, or extraneous evidence showing facts rendering it impossible, or, at least, very highly improbable, that it could have been used as what lawyers call a word of 'purchase,' or as indicating

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offspring only in the first degree, be construed to be a word of purchase, and to mean only offspring in the first degree." In Robinson v. Robinson (1 Burr. 38), the testator said: "I bequeath all my real estate to Lancelot Hicks, of Plymouth, during the term of his natural life, and no longer, provided that he alter his name, and take that of Robinson, and live at my house at Bochym; and after his decease, to *such son* as he shall have, lawfully to be begotten; and for default of *such issue*, then to my cousin."

It was held by the House of Lords, on appeal, that, notwithstanding the words "during his life and no longer," Lancelot Hicks took an estate in tail male, although it was claimed that the devise to the son of the body of Lancelot Hicks was satisfied by the birth and death of his eldest son.

In Hodges v. Middleton (2 Doug. 431), the testator devised to Mrs. Middleton all her real estate "during her life, and at her death to her children; and, in case of failure of children of Mrs. Middleton, to George Hodges," &c. Held, that this gave either an estate tail to Mrs. Middleton, or an estate for life with the remainder in tail to her children—making the word children of the same effect as the word issue.

In Doe v. Webber (1 Bar. & Ald. 713) the testator gave certain real estate to her "niece, Mary Hiles, her heirs, executors, administrators, or assigns forever. And my will is, that in case my niece, Mary Hiles, shall happen to die, and leave no child or children, then unto my niece Jane Barnes," &c. Held, that the words child or children are synonymous with issue. Lord Ellenborough says: "In this case it has been contended that the words 'child or children' mean issue, and that the first devise is, therefore, either converted unto an estate tail by the limitation over on Mary Hiles' dying and leaving no child or children, in which case the limitation over is a remainder, and barred by the recovery—or, if the first devise be considered to be in fee, that the limitation over is too remote, as being an executory devise to take effect after an indefinite failure of issue."

"It is true," he proceeds, "that the words 'child or children' may mean issue; and where the intent requires it, the word 'chil-

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dren' has not been confined to the immediate descendants, though that is its ordinary and proper sense, but has been extended to all the descendants, as in Wild's case, 6 Coke, 17 *a*." &c. "And in the present case the words 'child or children' must be construed to mean 'issue,' because it is the manifest intention of the testatrix that Jane Barnes should not take by the devise over in exclusion of any of the issue, however remote, of Mary Hiles." This "manifest intention" was made known by the words "child or children" only. The will contains no other expression of the testatrix's intention.

In Doe *v.* Simpson (3 Man. and Grang. 929) the testator devised certain property to his son, Dr. John Simpson, his heirs and assigns forever, and added: "But if it shall happen my said son, Dr. J. S., shall die without leaving any child or children, in that case I give and devise" unto Mary and others, who are his illegitimate offspring. After making certain other provisions, he adds, that if his present wife should leave no issue to inherit certain other property named, he gives it to Mary and others, "as all the other property above-mentioned given and bequeathed to my said son, Dr. J. S., in case he die without issue." Lord Denman, Ch.J., cites with approval the preceding observations of Lord Ellenborough, and adds, in relation to the clause last cited: "We consider this an interpretation by the testator himself of the word children, as used by him in the previous part of the will. It is as if he had said, that, by the previous part of his will, he had given the property in dispute to his five natural children, only in the event of Dr. John Simpson dying without issue; and he had not, in fact, said this unless the word children be read, as we think it must, as being synonymous with issue."

In Hewit *v.* Ireland (1 P. Williams, 426) the objections were twofold: first, that children "to be begotten" did not include children in existence at the testator's death; secondly, that the remote descendants could not take. Lord Chancellor Parker described the objections as "alike" and "equally unreasonable," and annulled them both.

In Parkman *v.* Bowdoin (1 Sumner's R. 368) a devise was to A.

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for life, and after her death to her second son B., and to his lawfully-begotten children in fee-simple forever; but in case he should die without lawfully-begotten children, to the other son of A. (C.), and to his lawfully-begotten children in fee-simple forever. At the time of making the will B. had no children. Held, that B. took a fee tail, with remainder to C. on an indefinite failure of issue of B. Judge Story, in deciding the case, examines all the authorities, from Wild's case (6 Co. R. 17) onwards, holding the word "children" to be a word of limitation, and not of purchase. He says: "To give any just effect, then, to the original devise, as well as to the devise over, the word 'children' must be construed as meaning issue or heirs of the body. And, although in its primary sense, the word 'children' is a descriptio personam who are to take, there is not the slightest difficulty in giving it the other sense, where the structure of the devise requires it. There are many authorities to this effect in cases analogous to the present."

The learned Judge then examines and reviews the case, a portion of which I have already called attention to. These authorities fully establish the two propositions for which the Respondents contend:

First. That the term "children" may include issue however remote, and will be held so to include whenever the reason of the thing demands it.

Secondly. In case of a contingent future gift to the children of a first taker, followed by a limitation over for want of such, the presumption is in favor of the first taker's posterity to her remoter descendants, in preference to the donee over.

I have examined with care the cases cited by the learned counsel for the Appellants, in the elaborate brief submitted with his argument.

None of them seriously conflict with the general views I have laid down, although some of them would place greater restrictions upon the rule construing the terms in question than would others. They all admit, as does the learned author of the work on Wills above quoted, that when the evident intention of the testator re-

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quires it, or when the estate would fail if such were not the construction, that the words child or children are to be construed as meaning issue or remote descendants. Limiting the rule to this extent, the Appellants' case cannot be sustained, as I have endeavored heretofore to establish. The judgment should be affirmed, with costs, to be paid to both parties from the fund.

GROVER, J.—The only inquiry in this case is, in what sense did the testator, Thomas Mackaness, use the words child and children in limiting the remainder of real estate devised to trustees for the benefit of his daughter, Mrs. Prowitt, for life; and also in his bequest of certain sums of money which the testator directed to be invested, and the interest paid to her during her life?

If the words were used in the ordinary popular sense, it is clear that both the real and personal estate so devised, upon the death of Mrs. Prowitt, passed to her two nieces, whose interest and rights are represented by the Appellants, and not to her grandchildren, whose interest and rights are represented by the Respondents.

The presumption is, that language is used in wills in its ordinary sense, unless from an examination of the entire will it appears that it was used by the testator in a different sense; and when this appears from such examination, the language is to be construed in the sense in which it was used by the testator. This follows from the rule that the intent of the testator is to be carried into effect, when consistent with the rules of law; and that this intent must be determined by the language of the instrument, read in the light of the extrinsic facts in reference to which the language was used by the testator. It is not disputed but that child and children, in their ordinary use, include only descendants in the first degree, and that descendants in the second or more remote degree do not come within such description.

It is therefore incumbent upon the Respondents to show that in the will in question the words, in limiting the property after the death of Mrs. Prowitt, were used in a different sense. It is

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claimed by the Respondents that, for the purpose of declaring the limitations of the property in question, it was used as synonymous with issue. This, I think, clearly appears, as to the real estate, from the clause limiting the same. As to this, the testator, in the second clause of his will, after devising the real estate to trustees in trust for his daughter Mary Prowitt for life, proceeds: "And after the decease of my said daughter Mary Prowitt, to the use of all and every the children of my said daughter Mary Prowitt, lawfully to be begotten, then living; if one child only, to him or her the whole, and to his or her heirs and assignees forever; and if more than one child, then to them, their heirs and assignees forever, in equal parts to be divided, and to the respective heirs of the body and bodies of all and every such child and children lawfully issuing." The testator then repeats the devise to her child and children, as above, and adds: "And in case every such child or children should happen to die before the decease of their mother, leaving lawful issue, then I do give and devise the part or parts of such child or children so dying unto the several and respective heirs of the body and bodies of all and every such child and children lawfully issuing, and to their several and respective heirs and assigns forever."

He then gives power to the trustees to lease the property during the minority of those entitled, and then further adds: "And in case my said daughter Mary Prowitt shall not have a child living at the time of her death, then I give and devise all the said real estate or property so given in trust," &c., to his two other daughters.

It is clear that in the above clause the testator used the words, child living at her death, as equivalent to issue living at that time. He had carefully provided that, upon the death of any child leaving issue, during the life of the mother, the share of such child should go to the issue. It would be absurd to suppose that his design was, that in case all the children died during the life of the mother, none of the issue should take, but that if one child survived the mother, all the issue of deceased children should take. That is not the fair import of the language employed by

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the testator. I think it clear that the grandchildren of Mrs. Mary Prowitt take the real estate under the will, to the exclusion of her nieces—daughters of her two sisters.

As to the sums of money invested for the benefit of Mrs. Prowitt for life, it is not quite so clear. This is bequeathed to her child or children at her decease, the same as the real estate, and in case she has no child living at the time of her death, it is given to her sisters, in like manner, without any provision that in case of the death of any of her children during her life, leaving issue, such issue should take the share that would have belonged to the parent in case such parent had survived Mrs. Prowitt.

Upon a close examination of the fourth clause of the will, in which the testator makes provision for his daughter Margaret and her children (if any), it will be found that child, children, and issue are used by the testator as synonymous to convey the same idea, and these words are used in this sense apparently to avoid tautology. This, I think, shows that the words "child living" were, in other parts of the will, used in the sense of issue living, and that the idea of the testator in devising this money to the sisters, &c., in case Mrs. Prowitt had no children living at the time of her death, was that if she had no issue living at that time; but that if she had issue living, such issue should take the money.

The judgment appealed from should be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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ISAAC BUTTS, RESPONDENT, v. WILLIAM WOOD AND OTHERS, APPELLANTS.

Trust—Incorporation—Director.

One holding a position of trust cannot use it to promote his individual interest by buying, selling, or in any manner disposing of the trust property committed to his care.

A director of a plank-road company, who is likewise the secretary and treasurer of the company, cannot, as director, vote himself extra compensation as secretary and treasurer, without infringing the above principle.

THIS action was brought mainly to set aside the proceedings of the Defendants, as directors of the Rochester and Webster Plank-road Company, in voting to the Defendant, Daniel Wood, without competent authority to do so, extraordinary compensation for his alleged services as secretary, and otherwise.

This is the only part of the case that comes before this Court—the decision of the referee on all other matters involved in the original litigation having been acquiesced in by the parties.

The Plaintiff, who sues for himself as a stockholder in the company, and for all other stockholders who choose to make themselves parties to the action, states in his complaint that the Defendant, Daniel Wood, had been appointed to be the secretary and treasurer of the company, under a resolution that his compensation should be one per cent. of the receipts of the company, and fifty cents per week in addition. This resolution was adopted December 17, 1855, and has not been repealed or modified.

At a meeting of the board of directors of the company, held July 5, 1859, there were present three of the directors. The three were Daniel Wood, his father, William Wood, and his kinsman, John Cornwall. At this meeting a claim was presented by Daniel Wood, for services as secretary and treasurer, to the amount of $933.33, which was audited, allowed, and ordered to be paid by the treasurer, the person who presented the claim.

It seems to be conceded that this amount was greater than would have been his due under the resolution of December, 1855,

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for the reason that questions were mooted on the trial as to whether or not his services were worth more, or his duties more or less laborious, than those of his predecessor, who worked under the resolution of December, 1855.

The case was referred to Hon. T. R. Strong, and resulted in a report, dated April 12, 1861, in favor of the Plaintiff. Judgment thereon was entered May 16, 1861, and upon a case with exceptions, the Defendants appealed to the Supreme Court, at General Term, where the judgment of the Court below was affirmed.

From that judgment the Defendants now appeal to this Court.

Daniel Wood for Appellants.

W. F. Cogswell for Respondent.

FULLERTON, J.—The bill of the Defendant, Daniel Wood, was presented, audited, and ordered to be paid at a meeting of the board of directors of the company, on the 5th day of July, 1859, when but three of the five directors who composed the board were present; the Defendant, Daniel Wood, being one of those present, and his father, William Wood, and John Cornwall, another kinsman, being the other two. This board, as thus constituted, had no authority to entertain the bill in question, or to do anything in relation to it. Daniel Wood being the claimant, was disqualified from acting, because he could not deal with himself, and without him there was no quorum of the directors, and they had no authority to transact business.

The relation existing between Daniel Wood and the corporation was that of trustee and cestui que trust (Robinson *v.* Smith, 3 Paige, 222; Angell & Ames, 258, 260; Cumberland Coal Co. *v.* Sherman, 30 Barb. 571; Aberdeen Railway Co. *v.* Blaikie Bros., 1 Macq. 461).

This being the case, I am disposed on this ground alone to think that the action of these directors was void. The rule that one holding a position of trust cannot use it to promote his individual interest by buying, selling, or in any way disposing of the trust property, is now rigidly administered in every enlightened nation, and its usefulness and necessity become more and more

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apparent. A careful examination of the testimony in this case shows that Wood could not have enforced this claim against the company, and the circumstances under which it was allowed and paid were a fraud upon its stockholders. To permit such a transaction to stand would be a reproach to the administration of justice. The authorities maintaining the invalidity of any act of a trustee in violation of his trust are numerous. It is sufficient to refer to the learned and exhaustive opinion of Davies, J., in Gardner v. Ogden (22 New York R., p. 332), where the whole subject is ably discussed, and the leading authorities collected. No principle of law is better settled and understood, and there is none more useful in its results.

The payment of this bill being a fraud upon the stockholders, the action was properly brought against the three trustees to recover the damages they had caused, and the judgment rendered seems in every way calculated to promote the ends of justice. It should be affirmed, with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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ALEXANDER McCOTTER, Appellant, v. THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK, Respondents.

Contract for Sale of Real Estate—Meeting of Minds—Equity.

A mere proposition to a municipal corporation to sell land and to fix the price thereof by arbitration, and the appointing in the form agreed of arbitrators to fix the price per acre, is not such a meeting of the minds of the parties upon the terms of purchase and sale as to constitute a contract enforcible in equity.

This action was brought in 1859, to compel the specific performance of an alleged agreement on the part of the Respondents to purchase from the Appellant certain lands situate on Ward's Island, in the East River, of a large part of which island the Respondents were already the owners, or to recover damages for the breach of such alleged agreement.

The action was referred to John L. Mason, Esq., as sole referee, to hear, try, and determine the same.

On the trial a voluminous mass of testimony was introduced, from which a brief statement of the facts is condensed, so far as they are necessary to illustrate the opinion of this Court.

Early in 1857, the Plaintiff made a proposition to the corporation of the city of New York, to convey to them the lands described in the complaint, of which he claimed to be the owner by contract title.

His proposition was, according to the Plaintiff's statement, that the Defendants might take the lands at a stipulated price, or, if that was not satisfactory, the Plaintiff would submit the matter to two arbitrators, one to be chosen by the Mayor, and one by himself.

In the proposition the land was particularly defined, and the numbers of the lots given.

The water grants to be included were all the water grants around the island, except what were previously sold.

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On the 31st December, 1857, the Common Council passed a resolution, which was approved by the Mayor, whereby the latter was "authorized and directed to appoint one arbitrator, to meet with one arbitrator to be appointed by the owner, Alexander McCotter, of all the private property and water-rights not owned by the Commissioners of Emigration, or the city of New York, on Ward's Island; which two arbitrators, if they cannot agree, shall have the power to select a third, provided said McCotter can give such satisfactory title as shall be approved by the Corporation Counsel; and said decision shall be binding for the purchase of said property by the corporation of the city of New York."

Two arbitrators were appointed, one on behalf of the Plaintiff, who, on the 13th day of February, 1858, made an award, finding the area of the upland property claimed by the Plaintiff to be thirty-one acres and upward, of the value of $2,500 per acre, and of the water-rights and privileges in front of the same to be of the area of nearly forty-nine acres, of the value of $100 per acre.

On March 2, 1858, the Common Council rescinded the resolution for the appointment of arbitrators, and such rescission received the approval of the Mayor, March 5, 1858.

In August, 1858, the Common Council passed, over the Mayor's veto, a resolution, of which the following is a copy:

"Resolved, That the Comptroller be authorized and directed to purchase from A. McCotter, all the land situated on Ward's Island, not now owned by the city of New York, or by the Commissioners of Emigration, including uplands, roads, and water-grants, to the Harbor Commissioners' bulkhead line, according to a map made by A. Kurth and Rosa, civil engineers, dated January, 1858, to which the said McCotter can furnish, or cause to be given, a good and sufficient title, to be approved by the Counsel to the Corporation; and the Comptroller is further authorized and directed to issue city bonds at per cent., for the payment of the same, upon the said McCotter withdrawing all or any claims or suit he may have against the city by virtue of any previous arrangement or agreement with the city government."

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Before this time, and on May 17, 1858, the Plaintiff had offered the lands on the island to which he could give a satisfactory title for $1,500 an acre, but on condition that the offer should be accepted and "settled" up, and fully consummated at "once," and "closed without delay."

On May 27, 1858, McCotter withdrew this proposition.

On the 18th of October, 1858, the Plaintiff, having previously produced to the Counsel to the Corporation his evidence of title to the lands claimed by him, and which were approved by the said counsel, tendered to the Comptroller conveyances thereof, and left the same in escrow with him, and demanded payment under his proposition of May 17, 1858, and the Comptroller declined payment.

On the trial a variety of questions arose as to area, with regard to roads running through the lands, and other matters, without entering into which this case may be properly decided.

On June 26, 1860, the referee decided in favor of the specific enforcement of the contract against the Defendants, directing the simultaneous delivery of the deeds and the payment of the alleged purchase-money.

On July 14, 1860, judgment was accordingly entered, directing the Defendants specifically to accept the proffered deeds, and simultaneously to pay to the Plaintiff $141,394.22 for principal, interest, and costs.

An appeal to the General Term was taken from this judgment, and after argument, on December 28, 1861, the same was reversed, and a new trial ordered, costs to abide the event.

From that judgment of reversal the Plaintiff appeals to this Court.

D. McMahon for Appellant.
Richard O'Gorman for Respondents.

WRIGHT, J.—The complaint, after particularly describing the lands which are the subject of the alleged contract, states that the Plaintiff "made a proposition *to the Defendant* to sell to said Defendant the fee-simple title to all and singular *the lands*

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aforesaid," at and for a reasonable price, to be "fixed by arbitration."

The premises described in the complaint, and which were the subject of this offer, and to which the phrase "the lands aforesaid" referred, consisted of the whole of Ward's Island, in the East River, and within the boundaries of the city of New York, *except* what was already owned by the city of New York, the Commissioners of Emigration, *and four lots, containing several acres, owned by Mr. Minturn.* This proposition was made some time in 1857, but at what precise time does not appear.

The Common Council of the city passed the following resolution, but whether in response to the foregoing offer is left to inference:

"Resolved, That the Mayor of the city of New York be, and he is hereby authorized and directed to appoint one arbitrator to meet with one arbitrator to be appointed by the owner, Alexander McCotter, of *all the private property and water-rights* not owned by the Commissioners of Emigration, or the city of New York, on Ward's Island, *which two arbitrators, if they cannot agree, shall have power to select a third,* . . . and *said decision* shall be binding for the purchase of *said property* by the corporation of the city of New York."

Without pausing to comment on the form of this extraordinary resolution (for it submits nothing in terms to arbitration), it is sufficient to observe, that so far as it can be considered a proposition to purchase, *it embraces the land of Minturn, in addition to the property offered by the Plaintiff.*

Because the lands embraced within the language of the resolution, and which it may be inferred the arbitrators were to appraise, were "*all* the private property not owned by the Commissioners of Emigration or the city of New York;" and it was the purchase of "said property" which the decision of the arbitrators was to make binding.

Whether this resolution was called forth by the offer of the Plaintiff is left to inference, but it appears from its terms that it was not an acceptance of it. The arbitrators found the value of

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the property "owned or claimed to be owned by the said McCotter, or to which he may furnish a valid title," but they did not estimate the value of the Minturn lots, nor did the Plaintiff ever obtain the title therefor.

That it was the object of the city to purchase *all* the lands on the island not owned by it, is apparent from the language of the report of the committee of the Common Council to whom the matter was referred. It was as follows: "*It is highly essential that the city should purchase whatever property there is on the island belonging to private individuals, and that forthwith.*"

Regarding the resolution as a reply to the Plaintiff's offer, the negotiation, therefore, amounted to just this: The Plaintiff offered to sell to the city of New York property which he at the time owned or controlled, and the city replied by offering to purchase, not alone the lands offered, but other lands in addition thereto, so as to own the whole island.

It therefore cannot be claimed, down to this point, that there was a contract, for the minds of the parties never met.

The learned counsel for the Plaintiff endeavored to answer this objection, on the argument, by saying that the Common Council evidently referred to McCotter's land *only* in the resolution, erroneously styling him as the owner of *all* the private property on the island, when the papers before them showed the contrary.

The difficulty in this argument is, that the resolution does not refer to any papers which were before the Common Council, so as to require them to be construed together. Nor does it appear that there was anything before them, except the original offer of McCotter, which, having been lost, was not produced on the trial.

In giving the contents of that offer, the Plaintiff testifies as follows: "The proposition, I think, was that they might take the lands at a stipulated price, or, if that was not satisfactory, I would submit the matter to *two* arbitrators to fix the value, the one to be chosen by the Mayor of New York, and the other by myself."

The resolution of the Common Council, on the other hand,

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proposed *two* arbitrators, and clothed them with the power to select a *third*, in case they could not agree.

This was not an acceptance, and the minds of the parties did not meet.

These considerations, together with the fact that no offer was ever made to convey the property under the alleged contract, disposes of this part of the case.

But it is alleged that there is still another and subsequent contract between the parties, in relation to the same lands, which the Plaintiff claims to enforce, and which arose as follows:

Subsequently to the award of the arbitrators, and on the second day of March, 1858, the Common Council rescinded the resolution authorizing the arbitration, and then, in August, 1858, by another resolution, "authorized and directed the Comptroller of the city of New York to purchase from A. McCotter all the land situate on Ward's Island, not owned by the city or the Commissioners of Emigration, . . . *to which the said McCotter could furnish or cause to be given a good and sufficient title.*"

Prior to this resolution, and on the 17th day of May, 1858, the Plaintiff offered the lands on the island to which he could give a satisfactory title for $1,500 per acre, on condition, among other things, that the matter should be closed without delay.

This proposition, not having been accepted, was withdrawn on the 27th day of the same month, and before the last-named resolution of the Common Council was passed.

Immediately after the resolution of August, 1858, the Plaintiff submitted to the Counsel to the Corporation the evidences of his title to the lands to which he proposed to give a title, which were approved by that officer, and a deed in due form was executed, and tendered to the Comptroller of the city, conveying said lands, which was refused. But it is not even suggested that the Comptroller, in virtue of the power conferred on him by the resolution, ever opened negotiations for the purchase of the lands in question, nor does it appear that the Plaintiff ever requested him to do so.

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The second offer of the Plaintiff to sell the lands had been withdrawn when the last resolution was passed, and even had it been otherwise, the resolution could not be construed as an acceptance of it.

It is true that it authorized and directed the Comptroller to buy the lands, but it did not fix the price which he was to pay for them, and that important part of the contract was left open for negotiation, as well as the terms of payment. The Comptroller was authorized and directed to issue city bonds for the payment of the lands—a matter which McCotter did not appear to have ever proposed or agreed to. And even the rate of interest which the bonds were to bear was left blank in the resolution itself.

From the whole case it is evident that no contract between the parties was ever made.

The judgment of the General Term must, therefore, be affirmed, with costs.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THE PRESIDENT, DIRECTORS AND COMPANY OF THE WESTFIELD BANK, RESPONDENTS, v. PETER P. CORNEN, APPELLANT.

Principal and Agent—Corporation—Director—Notice.

Wherever the very act of the agent is authorized by the terms of the power, and the act is in itself warranted by the terms used, such act is binding on the principal as to all persons dealing in good faith with the agent. In such case the *apparent* authority is the *real* authority.

Notice to a director of a bank that a note discounted by the bank is an accommodation note, is notice to the bank only in cases where the director was acting as the agent of the bank at the time of the notice.

It is upon the principle that the agent stands in the stead of the principal only while acting as his agent.

PARKER, J.—The action is brought upon a promissory note for $3,000, purporting to have been made by the Defendant, by his attorney, H. A. Bartlett, dated 18th September, 1860, payable three months from date, to the order of Carson & Hard, and by them endorsed to Jessup & Laflin, who endorsed it to the Plaintiffs.

It appeared upon the trial that Bartlett, who made the note in the Defendant's name, was his attorney in fact, for him in his name, place, and stead, to sign all notes and checks, and accept all drafts, in conducting his business, as then prosecuted by him in the city of New York; that the note was, at the request of Jessup & Laflin, discounted by the Plaintiffs before maturity, in the usual course of business, for the benefit of Carson & Hard.

The Defendant offered to show that the note was made as an accommodation for Carson & Hard, and not in the usual scope of Defendant's business, and without his knowledge or counsel. This was objected to by the Plaintiffs, and excluded by the Court, to which ruling the Defendant excepted.

It was shown that Jessup was one of the directors of the Plaintiffs' bank, and that he knew the object for which the note

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was made, but he had no power to direct the note to be discounted, and did not so direct.

The counsel for the Defendant then renewed the same offer, on the ground that the bank had notice that the note was an accommodation note through Jessup, a director. This was objected to by Plaintiffs' counsel, and excluded by the Court, and the Defendant excepted.

When the Plaintiffs rested their case, the Defendant moved for a dismissal of the complaint on the grounds:

1. That the evidence in the case shows that the authority of the agent Bartlett was a special authority, and limited to the business of the Defendant.

2. That there is no proof that Bartlett, in giving the note in question, acted within the scope of his agency, and had authority to give it.

3. The authority of the agent Bartlett being special and limited, and the Defendant having offered to show that the note was an accommodation note, the Plaintiffs must show themselves to be bonâ fide holders.

The motion was denied, and the Defendant excepted.

The Defendant called Jessup as a witness, and asked him the following question: "At the time the note was made, was there another note made for the same purpose, and subsequently diverted to other purposes by you?" The Plaintiffs' counsel objected to the question as immaterial and irrelevant, and the objection was sustained, to which ruling the Defendant excepted.

The following question was then put by the Defendant's counsel to the witness: "Were you and Laflin, at the time the note was made, creditors of Carson & Hard?" The question was objected to by Plaintiffs' counsel as immaterial and irrelevant. The Court sustained the objection, and the Defendant's counsel excepted.

The evidence being closed, the Defendant's counsel asked that the question, whether the Plaintiffs had notice that the note was an accommodation note, should be submitted to the jury, and that they should be instructed, that, if they found the Plaintiffs

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had such notice, then the Defendant would be entitled to a verdict. The Judge refused the request, and directed the jury to find a verdict for the Plaintiffs, for the amount of the note and interest, to which the Defendant's counsel excepted. The jury rendered a verdict for the Plaintiffs for $3,063.50, upon which judgment was entered. Upon appeal to the General Term the judgment was affirmed.

There is no doubt that the Plaintiffs are bonâ fide holders of the note for value, unless they are chargeable with notice of its being an accommodation note, by reason of notice of that fact to Jessup, a director. If they are bonâ fide holders of the note, for value, under the rule which is now well settled they are entitled to recover against the Defendant, notwithstanding the fact that his attorney exceeded his authority in making it. The principle is, as stated in North River Bank v. Aymar (3 Hill, 262): "Whenever the very act of the agent is authorized by the terms of the power—that is, whenever by comparing the act done by the agent with the words of the power—the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent. Such persons are not bound to inquire into facts aliunde. The apparent authority is the real authority." This principle, although the case was reversed by the Court for the Correction of Errors, has been since recognized and established by numerous cases in this court (Farmers' Bank v. Butchers and Drovers' Bank, 4 Kern, 627; S. C. 16 N. Y. R. 135; Griswold v. Haven, 25 N. Y. R. 595; Exchange Bank v. Monteath, 26 N. Y. R. 505; Bank of New York v. Bank of Ohio, 29 N. Y. R. 619). The note being negotiable, the maker is deemed in law to enter into a contract with every one to whom it is afterward negotiated; so that the Plaintiffs thus stand in privity with the Defendant, and are within the rule, dealing in good faith with the agent, notwithstanding the payees and their immediate endorsers had notice that the agent was transcending his authority in the making of the note (Farmers and Mechanics' Bank v. Butchers and Drovers' Bank, 16 N. Y. R. 141; Griswold v. Haven, 25 N. Y. R. 602).

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This principle disposes of the exception to the refusal to dismiss the complaint, and brings us to an examination of the question, whether notice to Jessup, that the note was an accommodation note, was notice to the Plaintiffs. It is to be remembered that Jessup, although a director of Plaintiffs' bank, was not acting as such in the discounting of the note, and, so far as was shown, or offered to be shown, notice of the object for which the note was made was not given to him as such director.

He was no agent of the bank in this transaction, and the rule that notice to an agent is notice to the principal, does not apply. It was said by Ch. J. Nelson, in Bank of U. S. v. Davis (2 Hill, 463): "I agree that notice to a director, or knowledge derived by him while not engaged officially in the business of the bank, cannot and should not operate to the prejudice of the latter. This is clear from the ground and reason upon which the doctrine of notice to the principal through the agent rests. The principal is chargeable with this knowledge, for the reason that the agent is substituted in his place, and represents him in the particular transaction; and as this relation, strictly speaking, exists only while the agent is acting in the business thus delegated to him, it is proper to limit it to such occasions." This agrees with the decision of the Court in National Bank v. Norton (1 Hill, 572). In that case one member of the firm, after dissolution, renewed a partnership note held by the Plaintiffs, without authority from, or knowledge of Norton, his late copartner. Before the making of the note in question, one of the directors of the Plaintiffs' bank knew of the dissolution of the firm, and the question was whether such knowledge was notice to the Plaintiffs. At the Circuit it was held that it was, and the Plaintiffs were nonsuited. A motion was made to the Court, in banc, in a case to set aside the nonsuit, and for a new trial, which was granted. The Court say: "In the case at bar the learned Judge held that proof of publishing the notice, and actual knowledge in the director whose duty, *as one* of the board, it was to pass on the discount and renewal of notes, and who was, therefore, to be regarded as the agent of the Plaintiffs, was sufficient proof of their knowledge. In this we

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think he erred. The *board* were the agents for the purposes mentioned, and they should acquire this sort of knowledge as such—or, at least, the firm should show notice brought home to some other agent specially authorized by the bank, or by the course of their business to receive it." (See also Angell & Ames on Corporations, §§ 307, 308, and cases cited.)

In the case before us, I think the knowledge of Jessup, that the note was an accommodation note, was not notice of that fact to the Plaintiffs.

The question put to the witness Jessup, whether, at the time the note in question was made, another note was made for the same purpose, and subsequently diverted to other purposes by him, was manifestly immaterial and irrelevant, and, therefore, properly excluded.

The same is true of the question whether Jessup & Laflin were creditors of Carson & Hard, at the time when the note in question was made.

There was no question to be submitted to the jury, and they were properly directed to find a verdict for the Plaintiffs.

The judgment should be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

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ALCESTE BUTTON, RESPONDENT, v. EMANUEL McCAULEY, APPELLANT.

Breach of Promise—Evidence—Mitigation—Conduct of Plaintiff.

In an action for damages for a breach of promise to marry, it is competent to prove any misconduct on the part of the Plaintiff, showing her to be an unfit companion in married life, in mitigation of damages.

Under the general issue in such action it is competent for the Defendant to prove in mitigation of damages that Plaintiff was in the habit of drinking intoxicating liquors to excess.

W. F. Cogswell for Respondent.

T. R. Strong for Appellant.

GROVER, J.—The declaration of Defendant to the Plaintiff that he would make a good home for her, was competent evidence, in connection with the other conversation had at the time. It tended to prove the contract of marriage alleged by the Plaintiff. The same may be said of his declaration to her, that he would build a brick house, and fit it up nice, keep a carriage, &c.

The Defendant offered to prove that the Plaintiff, while she was living with him, drank intoxicating liquors to excess, and sometimes got intoxicated. The Plaintiff objected to this proof. The objection was sustained, and the Defendant excepted. The case is very brief, and does not fully show the evidence that had been given.

When this proof was offered, the fair intendment from the case is, that the Defendant, although unmarried, had a family with which he lived; that the Plaintiff lived with him, for a time, as housekeeper. That the courtship was had, and the promise of marriage was made, while she so lived with him. The Plaintiff's counsel insists that the evidence was not admissible under the answer. The answer was a general denial only. Under this answer it is clear that the evidence offered was not competent as a defence to the action (Code, § 149; McKyring v.

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Bull, 16 N. Y. Rep. 279). It was admissible under the answer, in mitigation of damages, if competent for that purpose (Travis v. Barger, 24 Barb. 614, and cases cited). I think the evidence was competent in mitigation of damages (Palmer v. Andrews, 7 Wend. 142; Willard v. Stone, 7 Cowen, 22, and cases cited). In these cases the evidence related to unchaste and immodest conduct, and it was held competent, either in bar or mitigation, according to the particular facts established.

The reasoning of the Court shows that any misconduct showing that the party complaining would be an unfit companion in married life, may be given in evidence, in mitigation of damages. It requires no argument to prove that habits of intoxication render the party addicted to them thus unfit.

It is insisted by the Plaintiff's counsel, that the evidence being inadmissible under the pleadings as a defence, the counsel should have specified in his offer the purpose for which he proposed to introduce it. This position cannot be sustained. When there is an offer of evidence competent for any purpose in the cause, and the evidence is rejected, it is error, although not competent for other purposes in the action. In Travis v. Barger (supra), the ruling of the Judge at circuit was sustained, upon the ground that it appeared that the evidence rejected was offered as a defence to the action, and that it was properly rejected as inadmissible, under the answer, for that purpose.

Under these circumstances, if the evidence is admissible for some other purpose, the counsel should specify such purpose. This is all that the case decides upon this point.

In the present case, the offer was general, and the ground of the rejection does not at all appear.

All that the case shows is, that competent evidence in mitigation of damages was offered and rejected, without anything showing the purpose of the offer or ground of rejection.

It is further insisted that the Defendant may have induced the Plaintiff to drink, or may have known of this habit, at the time of entering into the contract.

The answer to this is, that if such facts existed, it was incum-

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bent upon the Plaintiff to prove them. The Defendant in his offer was not bound to negative them.

My conclusion is, that the judgment appealed from should be reversed, and a new trial ordered.

All reverse, except PARKER and HUNT, JJ.

JOEL TIFFANY,
State Reporter.

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CATHARINE JENKINS, ADMINISTRATRIX, AND THOMAS G. WAIT, ADMINISTRATOR, ETC., RESPONDENTS, v. DAVID E. WHEELER, APPELLANT.

Master of Vessel—Contract for Services—Lien—Condition precedent.

The master of a vessel has no lien on the vessel for his wages; he contracts upon the credit of the owners thereof. Per Davies, J.

The doctrine of mariners' contracts, seamen's wages, &c., that freight is the mother of wages, does not apply to the contract of the master for wages.

Where the master was engaged for a round voyage, and the vessel was lost, held, that the Captain could recover wages only for the time employed as master of the vessel; and that the breaking up of the voyage by the loss of the vessel, terminated his employment as Captain, and that he could not recover for wages after that time.

J. W. Edmonds for Appellant.
C. N. Black for Respondents.

DAVIES, CH.J.—Oliver N. Jenkins, the Plaintiff's intestate, was employed by one Anthony Pelletier to take charge of the bark Peytona, then lying in the port of New York, on her then contemplated voyage to Australia. The title of the bark then stood in the name of the Defendant as owner, although, in fact, he was not such owner. On the 8th day of February, 1853, the Defendant, in whose name the title to the bark stood, and Jenkins, entered into an agreement substantially as follows: The said Jenkins thereby agreed to and with the Defendant, to take charge of the bark Peytona, then lying in the port of New York, for her then present voyage to Australia, and return to New York, according to instructions given him by Anthony Pelletier; and Jenkins agreed to use his best efforts for the interests of the said bark and owners.

And the Defendant covenanted and agreed that he would pay to Jenkins, in consideration of said services, the sum of one hundred and fifty dollars for each and every month of said period during said outward and return voyage.

The bark was owned by said Pelletier, and Overman & Gruner;

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and they were the persons beneficially interested in said voyage.

The instructions of Pelletier to Jenkins, under date of Feb. 7, 1853, are set out in the case, and show fully that Pelletier assumed the sole control and direction of the voyage. The Defendant offered to prove on the trial that this agreement between himself and Jenkins was signed by him solely for and on behalf of said Pelletier, Overman & Gruner; that they were the only persons beneficially interested in said bark Peytona; that the Defendant had no beneficial interest in her or her cargo or voyage; that he was not interested in or connected with any other ships or mercantile business; and was connected with said bark Peytona only as holding the naked legal title to her, for and on behalf of said Pelletier, Overman & Gruner; that all these facts were known to said Jenkins, and to all parties having dealings with said bark Peytona, or her owners, before said agreement in suit was executed; and that Jenkins, in making such agreement, gave credit to and relied upon the responsibility of said Pelletier, Overman & Gruner, and not upon that of the Defendant.

To this evidence the Plaintiffs' counsel objected, and upon such objection the same was excluded. In the further consideration of this case, we shall assume that the matter so offered in evidence, and excluded on the Plaintiffs' objection, was true, and could have been proven. The bark Peytona sailed on her intended voyage from the port of New York soon after the date of said agreement, and was compelled, in the judgment of the master, to put into the port of Bahia, South America, by reason of shortness of water. After leaving Bahia the vessel put into Cape Town, on the coast of Africa, for water and fresh provisions. After leaving Cape Town, the bark encountered heavy winds and lost her rudder; and the vessel leaked, and the captain then put into Port Louis, on the island of Mauritius, where he arrived on the 16th of August, 1853. On the 8th of September following, the captain abandoned the vessel to the underwriters, and she was advertised for sale; and the further voyage was then abandoned. The Judge, at the trial, instructed the jury that the Plaintiffs (in whose name

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the suit had been revived upon the death of Jenkins) was entitled to recover of the Defendant $150 a month, from February 8, 1853, to November 25, 1853, and for such further period of time as would be reasonably required for Captain Jenkins to return to New York from Mauritius, by the first usual mode of conveyance that presented itself after November 25, 1853, with interest on the aggregate amount from February 14, 1855, unless the voyage was broken up through the unskilfulness, negligence, fault, or fraud of Captain Jenkins, in which event the Defendant was entitled to a verdict; or unless some damage had accrued to the Defendant from the fault, negligence, unskilfulness, or fraud of the Captain in the line of his duty.

The Defendant claimed that the voyage was broken up by reason of the negligence, unskilfulness, neglect, fraud, and fault of the Captain in this:

First. That the vessel could have been repaired and proceeded on her voyage, and therefore the Captain was not justified in abandoning her, and causing her to be advertised for sale.

Second. That the Captain, without good cause, deviated twice from the course of the voyage, and put into Bahia and Cape Town, and remained there longer than was necessary, and thereby caused the vessel to encounter the storm which was the immediate cause of the necessity of putting into Mauritius.

The Judge charged that, if the jury should find both that the Captain could have procured sufficient means to repair the vessel, and that under all the circumstances it was best for the interests of the owners that she should be repaired at Mauritius, then their verdict was to be for the Defendant. If, however, they should find either that the Captain could not procure sufficient means to repair the vessel, or if he could that it was not for the best interests of the owners to have the repairs made at Mauritius, then the Captain was justified in abandoning the vessel and advertising her for sale; and the Judge further charged, that if, after taking all the matter referred to into consideration, with the other facts proved in the case, the jury should come to the conclusion that means could have been raised for making these repairs, and that it was

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for the best interests of the owners that the repairs should have been made at the port of Mauritius, then that disposed of the case in favor of the Defendant, and there was no necessity of considering the other matters set up in his defence. If, however, the jury should come to a contrary conclusion, then, in order to find for the Defendant, they would consider the second claim of the Defendant, which was whether the Captain, without good cause, deviated from his course to put into Bahia and into Cape Town, and remained there longer than was necessary, and by such deviation contributed to the disaster which finally compelled the ship to put into Mauritius. And he also charged, that if the jury should find that the Captain, without just cause, did deviate from the proper course laid down for the prosecution of the voyage, and did remain longer than was necessary, and that these two things contributed to the final disaster, then, in that event, the jury were directed to find their verdict for the Defendant. He further charged, that if the jury should find against the Defendant upon these three points, then that they should find for the Plaintiffs, unless, by reason of some further negligence or unskilfulness of the Captain in the line of his duty, some damage had occurred to the owners, and that, in that case, the jury should inquire what the damage was, and deduct the amount from what the Captain would otherwise be entitled to recover, and give a verdict for the balance in favor of the Plaintiffs.

The Defendant excepted to the charge, as to the time for which wages were recoverable, on the ground that, if recoverable at all, they could not be recovered for a longer period than from the inception of the contract sued on to the breaking up of the voyage.

The Defendant also excepted to that portion of the charge which stated that the Plaintiff was entitled to recover unless the voyage was broken up through the unskilfulness, negligence, fault or fraud of Captain Jenkins. Also, to that portion of the charge in reference to the first and second claims set up by the Defendant; and also as to what the Judge charged the jury, in reference to the damage sustained by the owners, arising from the

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negligence or unskilfulness of the Captain, or from the unjustifiable deviations (if the jury should find such deviations unjustifiable) made by the Captain in the prosecution of the voyage. The jury found a verdict for the Plaintiffs for the sum of $5,285—thus allowing the Captain his monthly wages, as specified in the contract with the Defendant, up to October 11, 1854, the time of his arrival in the port of New York, and interest on that sum from February 14, 1855.

Judgment was entered at the Special Term of the New York Supreme Court, in accordance with the verdict, for the Plaintiffs, and on appeal to the General Term of that Court, the judgment, by consent of the Plaintiffs, was modified by deducting therefrom the amount allowed the Plaintiffs for the wages of the intestate from May 27, 1854, to October 11, 1854, amounting to $675, with interest from February 14, 1855, amounting, in all, to the sum of $1,195.53; and the General Term affirmed the judgment with such deductions.

The verdict of the jury must be taken and assumed to have established the following facts in this action:

1. That the voyage in question was not broken up through the unskilfulness, negligence, fault or fraud of Captain Jenkins.

2. That the vessel could not have been repaired at Mauritius, and have proceeded from thence on her contemplated voyage to Australia; and that the Captain was justified in abandoning the vessel, and such voyage, at Mauritius, and causing the vessel to be there advertised for sale.

3. That the Captain did not deviate twice from the course of his voyage, by putting into Bahia and Cape Town, without good cause; and that he did not remain in those places longer than was necessary, and that such deviations and delays were without fault on his part.

4. That the owners of said bark did not sustain any damage by reason of the fault, negligence, or unskilfulness of the Captain in the line of his duty.

These facts being established, if no error was committed upon the trial, it would follow, as a necessary consequence, that the

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Captain, if entitled to recover at all, was entitled to recover the wages agreed upon from the Defendant, so long as he continued in command of the vessel.

We are to bear in mind, however, in looking into the rights of the Captain, that they arise and grow out of the contract made with the Defendant, so far as any liability on his part exists.

The law of England, and that of this country, holds that the master has no lien on the ship for his wages, and it is now definitely and clearly settled in England, that the master contracts upon the credit of the owner, and not of the ship, and that he has no lien on the ship, freight, or cargo for any debt of his own, as for wages, or stores purchased, or repairs done at his expense, either at home or on the voyage. The reason for this laid down in the books of the common law is, that although mariners are supposed to contract on the credit of their ships, the master's contract is altogether of a personal nature, on the credit of the owner (12 Mod. R. 405; Read v. Chapman, 2 Strange, 937; Ragg v. King, id. 858; Clay v. Sudgrave, 1 Salk, 33; S. C. 1 Ld. Ray. 576, and Carth. 518; Curtis' Rights, &c., p. 252; 3 Kent's Com., p. 166).

Chancellor Kent thought this doctrine in the English law remained yet to be definitely settled and declared in this country, and refers to various cases in which the English authorities have either been overruled, questioned, or qualified by the Judges in the United States. But he says that, by the case of Van Bokkelin v. Ingersoll (5 Wend. 315), as settled in the Court of Errors in New York, the English law was recognized, that the master had no lien on the freight, nor on the vessel, for his wages. If it were necessary to the decision of this case, we should feel bound to adhere to the doctrine thus promulgated by the highest Court of this State as the law of this State, and which has been a recognized rule of law therein for nearly forty years. The master's contract is therefore to be governed by and construed by the same rules of law as are applicable to other contracts. The doctrine in relation to mariners' contracts, and to those of seamen for wages, and the maxim that "freight is the mother of

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wages," have no relevancy or application whatever to the contract of a master for his compensation as such. That contract is to be governed by its terms, and by the same rules which are applied to the construction of all other contracts. By the terms of Captain Jenkins' contract with the Defendant, he agreed to take charge of the vessel, and be governed in the discharge of his duties, as master thereof, according to the instructions given to him by Pelletier, and to use his best efforts for the interests of the said bark and owners. A faithful compliance with these terms was a condition precedent to his right to demand and receive the stipulated wages. The case of Van Bokkelin v. Ingersoll (supra) held that the Captain, to entitle himself to his wages, must show that his conduct was that of a prudent, judicious, and careful master. The Judge at the trial therefore properly told the jury that the Plaintiffs could not recover if the voyage was broken up through the unskilfulness, negligence, fault or fraud of Captain Jenkins. In Macy v. Wheeler (30 N. Y. 231), which was an action for supplies furnished this same vessel, where the same facts appeared as to the ownership of this vessel as were given in evidence or offered in evidence upon the trial of this action, this Court held, that it was indubitably established that Pelletier was the real owner of the vessel, both before and after the transfer to the Defendant; that the Defendant had no interest in her or her earnings, and that they belonged to Pelletier, or those to whom he transferred them. That under these circumstances the Defendant was not liable for supplies, unless purchased by him, or by some person authorized by him.

Applying the doctrine of this case to the one now under examination, it follows that, independent of the contract given in evidence, there would be no liability whatever on the part of the Defendant for any wages due the Captain, or for services rendered by him for or on account of this vessel or her owners, or for their benefit. No implied promise, therefore, could be raised that the Defendant was to pay for the same, as Captain Jenkins well knew the special relations this Defendant held to said vessel, and to her

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owners. And it also follows that, whatever may be the liability of the owners to the Captain for services rendered on a quantum meruit, or on implied assumpsit, the Defendant's liability can alone spring from, and must be measured by his contract. But it was competent for the Defendant to stipulate and agree to pay either the Captain's wages or to pay for supplies furnished the vessel, or any other liability which he might elect to incur; such agreement or undertaking was in its nature collateral to the primary liability of the owners for the debt, which was in fact theirs. The position of the Defendant in this action is that of surety for the owners, who are primarily bound to pay and discharge the wages of the captain employed by them to navigate their vessel, and for their benefit. In this aspect we are to regard the Defendant's undertaking, and the liability arising therefrom. A careful examination of the contract entered into between the parties will show what each contracted to perform, and the liabilities imposed thereby upon each. Captain Jenkins agreed, on his part, to take charge of the bark for her then present voyage to Australia and return to New York, according to the instructions given to him by Pelletier. By reference to them, it will be seen that a round voyage was contemplated from New York to Australia and back. And in consideration of the said services the Defendant agreed to pay Jenkins the sum of $150 per month for each and every month of said period during said outward and return voyage. This contract was entire, and for the round voyage, and unless there was full performance on the part of Jenkins, the Defendant cannot be called upon, in accordance with the terms of his contract, for payment as for a part performance. The current of decision on this question is too uniform, and the principles settled too firmly established, to permit them to be questioned or departed from.

It is needless to go outside of the discussion had upon this question in this State. The case of McMillan v. Vanderlip (12 John. 165) contains an elaborate review of the English cases, and enunciated the settled rule of law with precision and entire accuracy. In that case the agreement was that the Defendants were to

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pay Vanderlip 3 cents per run for spinning, and that he was to work for them 10½ months, and the Plaintiff claimed for spinning 845 runs at 3 cents per run. The question was whether the contract was an entire contract, performed on the part of the Plaintiff, operating as a condition precedent, or whether the agreement to pay 3 cents a run on one side, and the promise to work for 10½ months on the other, were independent and unconnected with the rate at which the Defendant was to spin. Judge Spencer said: "It is evident to my mind that the parties before us intended that Vanderlip should serve the McMillans for 10½ months, and that he should be paid 3 cents for each run of yarn spun by him, and that they intended this as one entire contract. * * * If the contract was entire, and looked as well to the price per run as to the time of service, it necessarily formed a condition precedent; and then Vanderlip could not sue until he had performed his contract of service, or until the period within which it was to be performed had elapsed." In view of this authority, we must regard the contract in the present case as one entire contract, and that the rate per month stipulated therein was to be paid on full performance of the condition precedent on the part of Jenkins, namely: the services as master of the vessel for the whole period of the round voyage. In Reab v. Moor (19 John. 337), affirmed in the Court of Errors, this case of McMillan v. Vanderlip was cited with approbation, and it was held, that when M. had contracted to work for R. for eight months for 104 dollars, or 13 dollars a month, that the performance of the work was a condition precedent, and that M. could not recover for three months' work performed.

It was also held, that the written contract between the parties was an entire contract of hiring for eight months, at a stipulated price. That M. was to work eight months for R., for which R. was to pay him 104 dollars, or 13 dollars a month—not 13 dollars at the end of every month, but the entire sum of 104 dollars to be paid was to be equal to that rate of compensation. So in the case at bar, it is clear that the monthly rate fixed was not to be paid at the expiration of every month; but when the round voyage

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was completed, Jenkins was to be paid at that rate for the time necessarily consumed in making it. See also Webb v. Duckingfield (13 John. 390); Burrill v. Cleeman (17 John. 72). In the latter case, the action was brought upon a covenant to a charter party. The Defendant agreed for the charter and hire of the vessel from New York to Pernambuco and back for the sum of $1,400 on delivery of the return cargo, on arrival of the vessel at New York. The vessel went to Pernambuco, but in consequence of the port being blockaded, could not land the outward cargo or take in a return cargo, but returned to New York with the cargo as originally laden on the vessel. Van Ness, J., in the opinion of the Court, said: "The freight stipulated to be paid by the charter party depended upon the performance of the voyage, and was a condition precedent to the freight being payable; and this condition not having been performed, the freight cannot be recovered." To the same effect are the following cases: Lantry v. Parks (8 Cowen, 63); Monell v. Burns (4 Denio, 121). It will now be convenient to examine the doctrine settled by this Court upon this question. This subject received a very thorough discussion in the learned and exhaustive opinion of Comstock, J., in Smith v. Brady (17 N. Y. 173). It contained a review of the authorities, and deduces from them this principle: That according to the settled law of this State, a Plaintiff cannot recover the payments which, by the terms of a true construction of the contract, are due only on condition of performance by him, unless he can show such performance, or prove that it has been waived.

The same doctrine was reiterated in Cunningham v. Jones (20 N. Y. 486). In that case it was held that the contract (an agreement to erect a brewery upon the Defendant's land, without any stipulation or agreement as to the time and manner of payment, except that the labor was to be performed by day's work) was an entire one, and indivisible, and that the contractor was not entitled to recover without a full performance on his part. It matters not that no price was fixed upon as a compensation. The Defendant had a right to insist, before he was called upon to pay, that the contract should be first performed. The same doctrine

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was reaffirmed in Baker v. Higgins (21 N. Y. 397). It is deemed clear that, by the terms of this contract, the Defendant agreed to compensate the Plaintiffs' intestate for the round voyage, at a certain rate of compensation per month for the time thus employed in fulfilling the contract, and that such compensation was not due and payable until the performance on the part of Jenkins of the conditions precedent to such payment.

In Oakley v. Morton (11. N. Y. R. 25), this Court decided that a condition precedent must be strictly performed to entitle a party to recover. Judge Allen, in his opinion, said: "Whenever a party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract" (citing numerous authorities). Judge Johnson, in the same case, said: "The performance must be exact, not cy près."

The voyage which Plaintiffs' intestate agreed to perform was not made. It is clear upon all the authorities that they cannot recover, unless some valid and legal excuse is shown for the non-performance by him. The Plaintiffs claim that the interruption of the voyage, and the sale of the vessel at Mauritius, furnish such an excuse. To this the Defendant is at liberty to say, "Non in hoc fœdere veni." Inevitable accident on the part of a third party is not an adequate excuse. The fault of the Defendant alone is available for such a purpose. As was correctly observed in the case last cited, such "accident by inevitable necessity is not available, because he might have provided against it by his contract."

This Court decided, in Harmony v. Bingham (12 N. Y. 99), that when a party unconditionally, by express contract, agrees to do an act, performance is not excused by inevitable accident or other unforeseen contingency not within his control; and in the opinion of the Court, by Judge Edwards, it is said "that this rule has been uniformly followed, and that, too, even in cases in which its application has been considered by the Court as attended with great hardship. The only exception which has ever been

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acknowledged, is where a party has contracted to do a thing which the law considers impossible."

Judge Ruggles said: "It is a well-settled rule of law, that where a party, by his own contract, absolutely engages to do an act, it is deemed to be his own fault and folly that he did not thereby expressly provide against contingencies, and exempt himself from responsibility in certain events. And in such a case, therefore—that is, in the instance of an absolute and general contract—the performance is not excused by an inevitable accident, or other contingency, although not foreseen by or within the control of the party." The same doctrine was enunciated by this Court in Tompkins v. Dudley (25. N. Y. 272). There the Plaintiffs, as trustees of a school district, sued to recover moneys advanced by them toward the erection of a school-house, paid on account to one Chambers, who had contracted with Plaintiffs to erect and build it for a certain sum, and the Defendant had guaranteed the faithful performance of the contract by Chambers. Before the building was entirely completed, it was destroyed by fire. This Court held that the Plaintiffs were entitled to recover, and that the justification for non-performance, the destruction of the building by fire and inevitable accident, without any fault on the part of the contractor, was no legal justification for the non-performance of the contract. The case of Adams v. Nichols (19 Pick. 275) was referred to. In that case Morton, J., in delivering the opinion of the Court, said: "The Defendants do not pretend that they have executed their contract to build a house for the Plaintiff, but contend that the facts disclosed furnish a legal excuse for not doing it. . . . In these and similar cases, which seem hard and oppressive, the law does no more than enforce the exact contract entered into. If there was any hardship, it arises from the indiscretion or want of foresight of the suffering party. It is not the province of the law to release persons from the improvidence of their own acts." In harmony with these principles is the case of School Dist. No. 1 v. Dauchy (25 Conn. 530), and also an instructive case of School Trustees of Trenton v. Bennett (3 Dutcher, N. J. 514). The Supreme Court of that State in its opinion says:

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"No rule of law is more firmly established by a long train of decisions than this, that where a party, by his own *contract*, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." In reference to the hardship of such a rule, the Court very justly says: "No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundation in good sense and inflexible honesty. He that agrees to do an act should *do it*, unless absolutely impossible. He should provide against contingencies in his contract. Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or rather the law leaves it where the agreement of the parties has put it. The law will not insert, for the benefit of one of the parties, by construction, an exception which the parties have not, either by design or neglect, inserted in their engagement." To the same purport is the law of Catlin v. Tobias (26 N. Y. 217).

It logically follows from these authorities that the contract of the Plaintiffs' intestate with the Defendant was for the round voyage and an entirety, and that the compensation therein specified was to be made upon its performance; that such performance was a condition precedent, and no action could be maintained until such performance had taken place, unless the party upon whom such performance rested established a valid and legal excuse for such omission or non-performance; that none such has been shown in this case, and, as a consequence, neither the Plaintiffs nor their intestate are entitled to claim such compensation. If these views are concurred in, it follows that the judgment appealed from must be reversed, and a new trial ordered, costs to abide the event.

The majority of the Judges are, however, of the opinion that the points discussed in the preceding opinion were not raised upon the trial of this action, and therefore are not now available to the Defendant. But they are of the opinion that the exception to the charge, as to the time for which wages were recoverable, if

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recoverable at all, that they could not be recovered for a longer period than the inception of the contract sued on to the breaking up of the voyage, presents the question distinctly for what period of time the Plaintiffs are entitled to recover wages of the Captain from the Defendant. This Court is of the opinion that such recovery must be confined to the period during which Captain Jenkins performed the service as master, namely: from the time of the inception of the voyage, on the 8th day of February, 1853, to the date of its abandonment and breaking up, on the 8th of September, 1853.

The judgment appealed from is therefore affirmed, without costs of this appeal, if Plaintiffs elect and consent to deduct all allowances for wages after September 8, 1853, and interest thereon included in the judgment. If they do not so elect and consent within twenty days after notice of this judgment, the said judgment is reversed and a new trial ordered, costs to abide the event.

WRIGHT, PORTER, FULLERTON, and PARKER, JJ., concur in reversing, unless there is a reduction of damages to compensation while actually navigating vessel.

Affirmed, conditionally.

HUNT, J., and GROVER, J., dissent.

JOEL TIFFANY,
State Reporter.

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JOHN C. MARTIN AND OTHERS, RESPONDENTS, v. CHARLES KUNZMULLER AND OTHERS, APPELLANTS.

General Assignment—Obligation of Assignor—Statute as to Set-off.

Where an action is brought by an assignee for the benefit of creditors, upon claims of the assignor against Defendants, such Defendants cannot set off on trial a demand evidenced by a promissory note not due at the time of the assignment.

Under the Code, in an action brought by an assignee, the Defendant can set off no demand against the assignor which was not the subject of a legal set-off at the time of the assignment.

John A. Mapes for Appellants.
J. E. Parsons for Defendants.

PARKER, J.—The firm of Graydon, McCreery & Co. made a general assignment to the Plaintiffs, for the benefit of their creditors, on the 7th of May, 1861. At the time of making the assignment they had a demand against the Defendants for goods sold, amounting to $3,107.42, to recover which this action is brought.

The Defendants held and owned, at the time of the assignment, three promissory notes made by Graydon, McCreery & Co.; the first for $671.28, which became due April 4, 1861; the second for $998.35, which became due April 11, 1861; and the third, which had not matured at the time of the assignment, but became due May 28, 1861. None of these notes had been paid. The action was commenced after all the notes matured, and the Defendants sought to offset the amount of these several notes of Graydon, McCreery & Co. against the demand which said firm had so assigned to the Plaintiffs.

The Court, upon the trial, allowed the first two notes, which had matured at the time of the assignment, as legal offsets against the Plaintiffs' demand, but instructed the jury that the third note, which did not mature until after the assignment, was not a legal offset. To this the Defendants excepted.

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The only question presented for decision upon this appeal is, whether the Defendants were entitled to offset the third note, which was not due at the time of the assignment of the demand in suit.

If the Defendants might have set it off against Graydon, McCreery & Co. at the time of their assignment, provided that firm had sued the Defendants on this assigned demand, it was a proper subject of set-off in this suit, otherwise not; for the case depends entirely upon the statute, which is as follows: "If the action be founded upon a contract, other than a negotiable promissory note, or bill of exchange, which has been assigned by the Plaintiff, a demand existing against such Plaintiff, or any assignee of such contract, at the time of the assignment thereof, and belonging to the Defendant in good faith before notice of such assignment, may be set off to the amount of the Plaintiff's debt, *if the demand be such as might have been set off against such Plaintiff, or such assignee, while the contract belonged to him.*"

The fact that, under the Code, the action is brought in the name of the assignees, and not of the assignors, as Plaintiffs, does not change the rights of the parties, and the Defendants are still entitled to the set-off, precisely as if the action had been brought by the assignees in the name of Graydon, McCreery & Co. as Plaintiffs, as it must have been when the Statute of Set-offs was passed (Myers *v.* Davis, 22 N. Y. R. 489); and the statute is now to be read and construed with reference to such change in the mode of bringing the action.

The simple principle applicable is this—that the assignee takes the contract assigned to him, subject to the right of set-off which the debtor had against it at the time of the assignment.

It would seem to be very clear, then, that the Defendants had no right to set off the third note against the demand in suit—for, at the time of the assignment, this note had not become due, and was not then such a demand "as might have been set off against" the assignees "while the contract belonged to them."

An allowance to a party by way of set-off is always founded on an existing demand in presenti, and not one that may be claimed in futuro (Aymar *v.* Astor, 6 Cow. 266; Myers *v.* Davis,

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supra; Bradley *v.* Angel, 3 Coms. 475; Kingston Bank *v.* Gay, 19 Barb. 459; Waldron *v.* Baker, 4 E. D. Smith, 440; Thompson *v.* Hooker, 4 N. Y. Leg. Obs. 17; Wells *v.* Stewart, 3 Barb. 40; Hicks *v.* McGrorty, 2 Duer, 295; Watt *v.* Mayor, etc., of New York, 1 Sandf. S. C. R. 23). The remark of the Court, in Wells *v.* Stewart, that "the words, '*if the demand be such*,' do not apply to the *nature* only, but also to the *condition* or *state* thereof," is sustained by the other cases, and presents a correct construction of the statute, which is decisive of the question before us. The decision of the Court below is in accordance with that construction. The judgment, therefore, is right, and should be affirmed.

DAVIES, CH. J.—The firm of Graydon, McCreery & Co., on the 7th of May, 1861, made a general assignment of all their property to the Plaintiffs for the benefit of their creditors. At the time of making said assignment the Defendants were indebted to the assignors in the sum of $3,107.42, for goods sold by them to the Defendants on eight months' credit, from August 9 to Oct. 20, 1860. The Defendants held and owned, at the time of said assignment, three promissory notes made by said firm of Graydon, McCreery & Co.; the first for $671.28, which had matured April 4, 1861; the second for $998.35, which had matured April 11, 1861; and the other for $1,400.78, which did not mature until May 28, 1861; and none of said notes had been paid. This action was commenced Oct. 3, 1861. After all of said notes had matured, this action was commenced to recover the price of said goods, and the Defendants then sought to offset the amount of the said three several notes, all then due and unpaid.

The Court charged the jury, that the Defendants were entitled to offset the amount of the promissory notes held by the Defendants, due at the time of making the assignment, with interest from date of maturity, from the amount of the Plaintiffs' claim. Said Justice further charged the jury, that the Defendants were not entitled to offset the amount of the note thirdly above described, and which did not mature until after the making of such assign-

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ment, or any portion thereof, from the Plaintiffs' claim; to which portion of said charge the Defendants' counsel excepted. The jury, under the direction of the Court, rendered a verdict for the Plaintiffs for $1,534.26—thus allowing the Defendants' set-off for the two notes due at the date of the assignment, and rejecting the set-off as to the other, not due at that time.

Judgment on the verdict was affirmed at General Term, and the Defendants appeal to this Court.

The only question presented for the consideration of this Court upon this appeal is, whether the Defendants were entitled to set off, against the Plaintiffs' demand, the amount of the note made by their assignors, which was not due at the time of the assignment to the Plaintiffs of the demand against the Defendants.

The provisions of the Revised Statutes applicable to set-offs are as follows: "If the action be founded upon a contract, other than a negotiable promissory note, or bill of exchange, which has been assigned by the Plaintiff, a demand existing against such Plaintiff, *or any assignee of such contract*, at the time of the assignment thereof, and belonging to the Defendant in good faith before notice of such assignment, may be set off to the amount of the Plaintiff's debt, if the demand be such as might have been set off against such Plaintiff, or such assignee, while the contract belonged to him." The Code has introduced no new rule affecting set-offs. The alteration made by it allowing the beneficial owner of a chose in action, not negotiable at law, to sue thereon in his own name, does not change the actual rights of the parties to any assignment of it. The Defendant is entitled to the same defence which he would have had if the former rule had continued to prevail, and the action had been brought in the name of the assignor, and to no other or different defence. The assignee would have been protected in his equitable rights, notwithstanding the non-negotiable nature of the contract, to the same extent that he is entitled to have them protected now that the owner or holder can prosecute in his own name. The change effected by the Code is simply as to the form in which the action is to be carried on (Per Denio, J., in Myers v. Davis, 22 N. Y. 489).

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This action is founded upon an indebtedness other than that arising upon a promissory note or bill of exchange—in other words, a non-negotiable contract. It has been assigned by the party who, previous to the Code, must have been the Plaintiff upon the record. In such an event, the statute declares that a demand existing against such Plaintiff (now assignor), or any assignee of such contract, at the time of the assignment thereof, may be set off to the amount of the Plaintiff's debt. To entitle the Defendant to avail himself of such demand as a set-off, he must show that it belonged to him in good faith before notice of the assignment. There is no point made that the Defendants did not acquire all the notes they claimed to set off, prior to the making of the assignment to the Plaintiffs. The question therefore is, if the Plaintiffs' assignors, at the time of the assignment, had commenced an action against the Defendants, to recover the amount of said account, could the Defendants have set off the note due May 28, 1861?

This precise point was distinctly presented in Wells v. Stewart (3 Barb. S. C. Rep. 40). Stewart, on the 14th of April, 1845, made his negotiable note, payable to one Coym, ninety days after date, and which, on the 26th day of May, 1845, was assigned to and became the property of Wells. On the 28th of May, 1845, Wells owed Stewart $75.70, which account on that day was assigned by Stewart for the benefit of creditors. The action was in Stewart's name, by his assignees, against Wells, to recover the amount of the account, and Wells claimed to set off the note of Stewart. The action must have been brought months after the note became due. Hand, J., in the opinion of the Court, said that the last clause of the statute above quoted is fatal to the claim set up by Wells. "At no time while this account belonged to Stewart, could this note have been set off against the account. Had Stewart sued Wells on the account, on the day he made his assignment, or had the assignees sued him within some weeks afterwards, the note would not have applied. The words 'if the demand be *such*,' do not apply to the *nature* only, but also to the *condition* or *state* thereof." In Watt v. The Mayor of New York

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(1 Sandf. S. C. 23), the action was by one Ellsworth, in Watt's name, as assignee, to recover the amount of several awards payable by the corporation of New York for lands of Watt, taken for opening streets in said city. The Defendants sought to set off against the award an assessment for benefit upon the lands of Watt, made in the same proceedings. And the sole question was whether such set-off could be made, and the Superior Court of New York thought it could not. Oakley, Ch. J., said: "It is clearly a case not coming within any provision of the Statute relative to Set-offs. At the time of the assignment there was no right of action by the Defendants against Watt; no demand of the assessments having been made. And we are at a loss to perceive any reason why the award in his favor was not assignable before it was due, like any other debt, so as to vest the entire interests in the same in the assignee, whose equitable rights the Court is bound to protect."

Beckwith v. Union Bank (4 Sandf. S. C. 604) is to the same effect. The suit was by Beckwith, an assignee of the Messrs. Hunters. At the time of this assignment there was standing upon the books of the Union Bank a sum of money to the credit of the Hunters. The assignee brought suit to recover this money. At the time of the assignment the bank held a bill endorsed by the Hunters, which subsequently fell due, and was protested, and the Hunters charged thereon as endorsers, and the bank charged the amount thereof against the credit of the Hunters. The Superior Court held that the assignment having been made in good faith, and transferring to the Plaintiff all the property of the Hunters, of every description, the deposit to their credit in the bank thereby became vested in the assignee. Therefore, when the bill fell due, and the Hunters became liable to the bank for its payment, there were no demands existing between them and the bank which could be the subject of set-off. The money to their credit belonged to the Plaintiff. The judgment in this case was approved in this Court (5 Seld. 211); this Court holding that the Code had effected no change in the substantial rights of the parties. In other words, the provision is, that the

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substantial rights of the Defendant shall not be affected by the substitution of the assignee as Plaintiff in place of the assignor. Judge Johnson observes, in the opinion of the Court, that "There is no pretence to hold that in an action in the name of the Hunters, before the Code, the demand of the bank could have been set off." The same doctrine is enunciated in Myers v. Davis (ubi supra). That was an action for goods, wares, and merchandise sold by Watrous & Lawrence to the Defendant, the Plaintiff being the assignee of all their property, in trust, for creditors. The Defendants sought to set off an account for work done for Watrous & Lawrence, under a contract made with them before their assignment, but upon which nothing was due at the time of the assignment. In the opinion of the Court, Judge Denio said: "If this suit had been prosecuted in the name of Watrous & Lawrence, for the benefit of their assignee, under the law as it stood before the Code, the Defendants' claim for a set-off would have been regulated by the [provision of the Revised Statutes, already quoted]; and the condition that the demand proposed to be set off must have been one existing against the assignors before the assignment, and have been capable of being set off against them while the contract sued on belonged to them, would have been fatal to the Defendants. I have said that the change in the practice does not affect the right to set off. It certainly does not improve the Defendants' condition; for the set-off, if the demand was perfect at the time of the assignment, would not be within the words of the statute, for it would not be against the Plaintiff, but against his assignors. Still it would, no doubt, be within its spirit. The Defendants' difficulty is, that at the time of the assignment they had no demand against any one. * * * At the time of the assignment to the Plaintiff in this case, the demand of the Defendants had not matured so as to be the subject of a set-off; and when it had so matured, the demand against them, on which this suit is brought, had passed into the hands of the Plaintiff, against whom they had no claim whatever." So in the case at bar. At the time Graydon, McCreery & Co. assigned to the Plaintiffs their demands against the Defendants,

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they had no mature demands against them except upon the two notes. On the authority of this case it is clear, therefore, that the debt not matured could not be the subject of a set-off against the present Plaintiffs.

In Chance v. Isaacs (5 Paige, 592) a similar question arose and was decided. The Defendant, Isaacs, being indebted to the Complainant in the sum of $687.28, gave to him a negotiable note for that amount, payable four months after date; which note the Complainant soon after endorsed and transferred to a third person, in the ordinary course of business. Some time afterward the Plaintiff became indebted to Isaacs in about the sum of $700, for which he gave him two promissory notes, payable at four and six months. A few days before the note of Isaacs fell due he became insolvent, and made an assignment of his property to the Defendant, Smyth, for the benefit of his creditors, including the two notes of the Complainant. When the note given to the Complainant fell due it was protested for non-payment, and the Complainant, as the endorser, was obliged to pay and take it up. He therefore filed the bill in this cause to restrain the Defendant, Smyth, from parting with the two notes given to Isaacs, and to have the note of Isaacs offset. The Vice-Chancellor decided that the offset could not be allowed, as the creditors under the assignment had acquired an interest in the notes of the Complainant before the note given to and endorsed by him had been protested for non-payment and taken up by him. The bill was dismissed with costs, and on appeal to the Chancellor the decree was affirmed. So in Bradley v. Angel, Executor, etc. (3 Comst. 475), where the Complainants were indebted to the Defendant's testator in the sum of between $3,000 and $4,000, to recover which the Defendant, as executor, brought an action at law. The Complainants thereupon filed their bill to compel a set-off of certain notes given by the testator which were not yet due, and to restrain the action at law. The estate of the testator was insolvent. It was held, nevertheless, that the bill could not be sustained.

I have looked at the case of Maas v. Goodman (2 Hilton, 275), and it certainly seems to conflict with the authorities above re-

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ferred to. With every possible respect for the learned members of the Court deciding that case, it cannot be properly followed; and thus we rule the law as unequivocally settled by the Courts in repeated decisions. We have held that if, at the time of the assignment, the Defendant has no present debt due and payable by the assignor he has no offset, and that he cannot set off, against a debt due and payable by him to the assignor, a debt of his which matures afterwards.

We see no sufficient reason, from any of the suggestions made by the counsel for the Appellants, for departing from the doctrine so often enunciated and affirmed.

The judgment appealed from must therefore be affirmed, with costs.

All affirm.

JOEL TIFFANY,
State Reporter.

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THE MONROE COUNTY SAVINGS BANK, APPELLANT, v. THE CITY OF ROCHESTER AND ANDREW WYMAN, RESPONDENTS.

THE ROCHESTER SAVINGS BANK, APPELLANT, v. THE SAME, RESPONDENTS.

State Taxation — Savings Banks — Act of 1866 — *Surplus — U. S. Securities — Exemption.*

The seventh section of the act of 1866 (vol. 2, p. 1647) provides for the taxation of the franchises of savings banks, or institutions; and provides a means by which to determine the amount upon which they are to be taxed, to wit, not exceeding the surplus earned and owned by such institutions.

THE Plaintiffs and Appellants in these cases were assessed by the assessors of the city of Rochester, at the same time the general assessment of city taxes was made, in May, 1866—in the case of the Monroe County Savings Bank, for a "valuation of personal property," $83,000; and in the case of the Rochester Savings Bank, for a "valuation of personal property," $126,000; which assessments were confirmed by the Common Council of said city at the time required by the charter thereof. On the 23d of April, 1866, the Legislature passed an act authorizing the taxation of stockholders in banks, etc., to take effect immediately (Laws of 1866, p. 1647, 2d vol.). The seventh section of this act is quoted in the opinion. It is claimed on the part of said banks that such assessment was illegal, upon the ground that it was in fact a taxation of United States securities, in which it is alleged that a portion of their surplus funds were invested.

The case was submitted on a written statement of facts, under section 372 of the Code. In this statement, in addition to the matters above stated, it appears that the Monroe County Savings Bank, at the times of the assessment and confirmation aforesaid, was indebted to depositors in the sum of $1,611,000, and held and owned money and securities to the nominal amount of $1,694,000, the nominal assets thus exceeding the indebtedness by the said sum of $83,000, which was taken, as aforesaid, as the valua-

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tion of the personal property of the bank for the purpose of the assessment. On the part of the Rochester Savings Bank a similar state of facts existed, leaving as its surplus over its liabilities the sum of $126,000. The submission of the former bank states that $425,000 of its securities were in bonds and securities issued by the United States.

At a General Term of the Supreme Court for the Seventh Judicial District, in July, 1867, judgment was rendered in favor of the Defendants, with costs. From that judgment both cases come by appeal to this Court.

FULLERTON, J.—It is settled by the decisions of the Supreme Court of the United States, that the State Legislature has no power to impose a tax upon the bonds or securities mentioned in the foregoing statement, issued as a means of borrowing money upon the credit of the United States, whether such bonds and securities are held by individuals or corporations; and it is agreed in such statement, that they are "exempt from assessment by the laws of Congress."

It is a necessary result that such exemption cannot be evaded by any mere change of form or name in the law by which the tax is imposed. If, in fact, the tax is laid upon such bonds or securities, then, by whatever form of words the imposition is laid, it is illegal.

Hence it is not lawful, for the purpose of State legislation, to assess the whole capital of a bank at its value, or at its nominal amount, when such capital is invested, in whole or in part, in such securities (2 Black, U. S. R. 620).

And a tax imposed by a State upon a bank, at a valuation equal to the amount of its capital stock paid in, is a tax upon the property of the stock constituting its capital; and if such capital is invested in such securities, the tax is illegal, and the law imposing it is void (2 Wallace, U. S. R. 200).

The principle decided in these and other cases decided in the same Court is, that whenever, by State law, a tax is laid upon property which consists of United States bonds exempt from tax-

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ation, then, in whatever form, or in whatever terms the law is expressed, it is void, and cannot be enforced.

I proceed to apply the rule thus stated to the case under consideration.

The act in question provides as follows: "The privileges and franchises granted by the Legislature of this State to savings banks or institutions for savings, are hereby declared to be personal property, and liable to taxation as such, in the town or ward where they are located, to an amount not exceeding the gross sum of their surplus earned, and in the possession of said banks or institutions, and the officers of such institutions or banks may be examined on oath by assessors, as to the amount of such surplus; and the property of such banks and institutions shall be liable to seizure and sale for the payment of all taxes assessed upon them for said privileges and franchises" (Laws of 1866, p. 1647, 2d vol.).

In declaring the privileges and franchises of a bank to be personal property, the Legislature has adopted no novel principle of taxation. The powers and privileges which constitute the franchises of a corporation are in a just sense property, and quite distinct and separate from the property which, by the use of such franchises, the corporation may acquire. They are so regarded by the law, and so regarded by common acceptation, and although it has not heretofore been customary, in this State at least, to subject them to taxation, yet it must be conceded that it may be done if the Legislature sees fit so to enact.

It follows, that if such taxation falls within the scope of legislative power, that power may also prescribe a rule or test of value. In the case stated, the Legislature, leaving the estimate to the assessors, would make the valuation depend upon all the circumstances which, irrespective of the amount of property which the corporation actually holds, give value to the privileges enjoyed. All franchises are not of equal value. One corporation may enjoy a monopoly, and another be subject to competition with rivals, thus being less valuable. In some instances the value of the franchise would depend upon the nature of the business authorized,

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and the extent to which permission was given to multiply capital for its prosecution. Under such circumstances it would be expected that the Legislature would prescribe some equitable test or rule of valuation which should guide or control the estimate of the assessors in fixing the amount of the tax. It can hardly be denied that a fair measure of the value of the franchises of corporations would be the profits resulting from their use, and in adopting such a rule of estimate, no one could justly complain of its being unequal in its effects upon different corporations, or unjust in its general operations.

In the case before us, the test of value of the franchises is not the amount of annual profits, but the rule is the judgment of the assessors limited to the amount of profits over and above the dividends of profits which the corporation has seen fit to declare and pay to its depositors.

These observations are made, not because the question whether the operation of this statute is just and right is open to judicial examination, but because they tend to prove that the act in question is what it professes to be—a tax laid upon the franchises named in it—and not an indirect tax upon the securities held by the bank, and in that way attempting to avoid the principle of the decisions already quoted. Bad faith, or a design to evade the inhibitions implied in the Constitution of the United States, or expressed in the acts of Congress, are not to be presumed or imputed to the Legislature, unless necessary construction compels it.

In this case the tax is declared, in terms, to be upon the franchises and privileges granted. If there are no surplus earnings, then there can be no tax. If there are such earnings, then it is reasonable to say that the privilege which produced them is valuable, and may justly be regarded as property subject to the taxing power. This mode of limiting the taxing power indicates strongly that the intention of the Legislature was, that it should not exceed a just and equitable assessment of the franchises and privileges granted, considered in reference to the pecuniary benefits and advantages resulting from their use.

It now becomes important to inquire whether the assessment

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in the case now before us is affected by the fact that the banks have invested a portion of their moneys received from depositors, or the profits arising on such moneys, in bonds or securities of the United States which are exempt from taxation.

In my opinion, if the whole of the Plaintiffs' funds were so invested, it would not affect the validity of the act. The tax being levied upon the franchises and privileges of the corporation, the special use which it makes of its lawful powers is quite unimportant. Because, I repeat, that neither the aggregate property employed, nor the accumulated profits, are taxed. They are regarded as important only as they may furnish a just and fair measure of estimating the value of the property which produced them, in order that such value may form the basis of taxation. I find no warrant for the assumption that, in the cases now before us, the surplus earned and in the possession of the Plaintiffs is invested in bonds or securities of the United States. The classification of their assets, which lays the foundation for it, does not result from the application of any rule of law, and we cannot judicially declare that the funds so invested are not the identical funds received from depositors. If it would affect the legal question, it should be shown, as matter of fact, that the surplus is specifically so invested.

It is true that where a State tax is laid upon the property of an individual, or a corporation, so much of their property as is invested in United States bonds is to be treated, for purposes of assessment, as if it did not exist; but this rule can have no application to an assessment upon a franchise, where a reference to property is made only to ascertain the value of the thing assessed.

It is, however, argued with great ingenuity and skill, that inasmuch as the Plaintiffs, among other powers given them, have the right to invest their money in United States bonds, their franchises and privileges cannot be taxed by the State. The power thus to invest their moneys, it is contended, is a franchise for lending to the United States, and therefore cannot be taxed, because such taxation would trench on the power of the United States to borrow. This is stretching the argument too far. It cannot be con-

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tended that the State would violate any obligation resulting from the power of the United States to borrow money, if the laws conferring the power upon the Plaintiffs to invest their moneys in United States stocks and bonds were repealed. The State is under no obligation, express or implied, to legislate to enhance the credit of the general government, and should it adopt a system of legislation which indirectly produces such a result, its power of repeal cannot be doubted. The position that a franchise granted by the bounty of a State is not taxable because coupled with that franchise is the privilege of loaning money to the general government, is not more untenable than to argue that because such a franchise enhances the credit of the United States, therefore the Legislature could not repeal the law granting the franchise without violating its constitutional obligations. Suppose the Legislature had limited the amount in which the Plaintiffs could invest its moneys in the securities of the United States, it will not be contended that such limitation would be void because it impaired the power of the United States to borrow money.

It must, therefore, be regarded as sound doctrine to hold that the State, in granting a franchise to a corporation, may limit the powers to be exercised under it, and annex conditions to its enjoyment, and make it contribute to the revenues of the State. If the grantee accepts the boon, it must bear the burden.

In my opinion, the statute in question here is not obnoxious to the objection that it is in conflict with the power of the United States, nor is it to be regarded in any sense as indicating an unfriendly or hostile spirit.

As to the effect of the change made in the statute in 1867, it is sufficient to say that the assessment, imposition, and confirmation of the tax in 1866, made such tax a debt due to the city of Rochester, and the subsequent amendment of the act had no retroactive effect to change the rights of the parties.

The judgment should be affirmed, with costs.

GROVER, J.—The seventh section of the act authorizing the taxation of the stockholders in banks, etc. (Laws 1866, vol. 2, p.

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1647), provides that the franchises granted by the Legislature to savings banks or institutions for savings, "are hereby declared to be personal property, and liable to taxation as such in the town or ward where they are located, to an amount not exceeding the gross sum of their surplus earned, and in the possession of said banks or institutions, and the officers of such institutions may be examined on oath by assessors," etc. There can be no doubt entertained as to the design of the Legislature in enacting the above section. Language could scarcely make it plainer. It was to tax the franchises of the institutions to which it was applied, as personal property, to an amount not exceeding the surplus earned and owned by such institutions, at the same rate, and in common with the other personal property of the State. The institutions so to be taxed are corporations created by the laws of the State, vested with valuable franchises conferred by the same laws. It is not disputed by the counsel for the Appellant that the Legislature has full power to tax these franchises for State and municipal purposes, in its discretion. It is claimed by the counsel, however, that this is not a tax upon the franchises, but upon the property of the bank, viz.: the surplus owned by the corporation; and that as this property consists of bonds of the United States government, which are exempt from State and municipal taxation, the Appellant is entitled to the benefit of such exemption. If the counsel is correct in the premises, his conclusion is sustained by the adjudication of the Supreme Court of the United States, which this Court is bound to follow in this class of cases. But the only basis of the position of the counsel is, that the surplus owned by the corporation is adopted as the value at which the franchise shall be assessed. It was competent for the Legislature to fix any valuation thereon which it deemed proper, or to adopt any standard deemed suitable. It having taken the surplus as a standard of valuation, it is wholly immaterial whether this surplus was taxable as property, or exempt therefrom. This in no way affects the right of the Legislature to refer to this as the measure of value at which the franchises shall be assessed. But it is argued that this was a contrivance by the Legislature to tax the United States

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bonds indirectly, when they could not do so directly. How was it known to the Legislature that any part of the surplus of these institutions was invested in government bonds? Or how does it now appear but that the bonds owned by the Plaintiffs, at the time of the assessment, were not purchased after the passage of the act, for the purpose of evading the taxation thereby imposed? Government bonds are dealt in by these institutions, bought and sold, as the managers deem most likely to promote their interest. I am wholly unable to see how this dealing can affect the right of the State to impose taxes upon the franchises granted by it. The exercise of this power by the State can in no way affect the power of the federal government to borrow money, any more than taxing property employed in lucrative business. If such property were not taxed by the State, its owners would have larger sums of money that they might possibly lend to the government. The necessary public burdens should be borne equally by all the property of the State, and those seeking to exempt themselves from their share, and impose such share upon others, in addition to their own, should make a clear case. The Plaintiffs', so far from being such, is, I think, a clear case of liability to taxation. The evidence of the instructions given by the Comptroller was wholly immaterial.

The judgment appealed from should be affirmed.

All concur.

Affirmed.

JOEL TIFFANY,
State Reporter.

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THOMAS WILTSIE, RESPONDENT, v. JAMES EADDIE AND WILLIAM R. EADDIE, APPELLANTS.

Practice—Referee's Report—Findings of Fact.

An exception that a referee has not found specifically upon certain questions of fact is not well taken. A referee is required to find upon issues only, and not upon evidence.

THE Plaintiff brought his action against the Defendants, alleging that he was engaged as a warehouseman, and forwarded on the Erie Canal, in 1859; and that the Defendants employed him to receive at, and ship from his warehouse, to the city of New York, a quantity of potatoes, for which they promised to pay him a reasonable compensation.

The Defendants denied these allegations. Conflicting evidence was given upon the question, whether the service was rendered by the Plaintiff on his own account, or as administrator of one Butler, and in pursuance, and in fulfilment of a contract made between him and the Defendants.

The referee found for the Plaintiff, and the General Term of the Seventh District affirmed the judgment entered upon his report.

The Defendants now appeal to this Court.

James L. Angle for the Appellants.

W. C. Rowley for Respondent.

HUNT, J.—After hearing the testimony produced by the parties, the referee found, as matter of fact, that at the time the potatoes were shipped, the Plaintiff was himself engaged in the business of warehouseman and forwarder; that he received and shipped from the warehouse occupied by him, and for the Defendants, thirteen thousand one hundred and twenty-seven bushels, and two thousand six hundred and twenty-five barrels of potatoes.

He found the value of the service, and made his report for the

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amount due to the Plaintiff from the Defendants upon this theory of the facts.

The Defendants ask a reversal of the judgment, on the ground that the referee refused to find specifically upon the question, whether the Plaintiff, before he received and shipped the potatoes in question, had information of the existence of a contract between one Butler, then deceased, and the Defendants, for receiving and shipping the same potatoes. The question was sharply litigated before the referee, whether the Plaintiff received and shipped the potatoes in question, acting as the administrator of Mr. Butler, or whether it was his individual transaction.

The question was independent, inasmuch as the Defendants claimed to have paid Butler, in full, for the same service for which the Plaintiff sought compensation in this action. As a fact of a chain of evidence against the Plaintiff, the testimony embraced in the question upon which the referee was then asked to find, was obviously material. No complaint is made of the exclusion of the evidence, as it was all received and considered by the referee.

The complaint that the referee has not found specifically upon the question suggested, is not well taken, and for two reasons: First, the referee is required to find and report upon the issues only, and not upon the evidence (Code, § 272). He must "state the facts found by him." Thus, he was bound to determine and report upon the question, whether the parties to this action entered into the contract set forth in the complaint. That was a precise issue before him. But he was not bound to say whether he believed the statements of a particular witness, or what his decision would have been if he had believed him, or disbelieved him. He was not bound to "state" whether a particular link in the chain of the evidence of either party existed or was wanting. Such is the character of the complaint now under consideration. As an independent question, it was not of the least importance whether the Plaintiff was aware that a contract for the shipment of potatoes existed between the Defendants and the deceased. It was only important as bearing upon the question in issue, viz.:

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whether a contract existed between the parties to the action, as set forth in the complaint. The referee has found, distinctly, upon that point, that such a contract did exist. That was, itself, a question of fact; and he further found that the service sued for was not rendered in fulfilment of Butler's contract. He is not called upon to find or explain the means and processes by which he arrived at that conclusion. When the referee decided and "stated" the contract thus made between the parties to this action, and that the service rendered was in fulfilment of that contract, he decided and "stated" all that was necessary on that branch of the case.

But again; the question referred to the referee for his decision was a question of fact, and can only come before this Court for its consideration, when the judgment of the referee has been reversed on a question of fact, and the order of reversal so certifies (Code, § 272). In the present case, the judgment of the referee was affirmed.

If the point of fact which, it is complained, was not decided, had been upon the main issue, it would not have been within our power to review it.

Under such circumstances, we can only review the decision of the General Term, when the referee decided without any evidence, or against all the evidence on the point. In the present case, the Plaintiff expressly denied any knowledge of a contract between the Defendants and the deceased, except as to the potatoes raised on Bullen farm. Each of these reasons is conclusive against the Appellants' claim, and they furnish an answer to the other points of the Appellants, to wit: that the referee declined to report whether both parties supposed that Wiltsie was acting in behalf of the estate, and also in relation to the receipt of the $7.00, and the application of the same; and also as to what took place upon the settlement of the accounts of the Plaintiff, as administrator of Mr. Butler.

These are questions of fact, and questions of evidence simply. The referee found that a contract was made between the parties to this action, by the service which was rendered by the Plaintiff for the Defendants, and which service was rendered by him in his

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individual capacity, and not as administrator. He properly held that the law implied a promise, from these facts, that the Defendants would pay to the Plaintiff the value of the service rendered.

The judgment should be affirmed.

All concur.

JOEL TIFFANY,
State Reporter.

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ELLEN HARRIS, PLAINTIFF, v. THE AMERICAN BIBLE SOCIETY AND OTHERS, DEFENDANTS.

Will—Construction—Life Estate—Estate in fee—Statute relative to Bequests.

CORNELIUS SEBRING died previously to 1830, seized, inter alia, of a lot of land in Ovid, Seneca county, containing about thirty acres. He left two sons and four daughters, his only heirs-at-law. His son Folkerd died in 1861, without issue, but leaving a will, which purports to dispose of his whole estate. In 1862, Ellen Harris, the Plaintiff, one of the daughters, brought an action in the Supreme Court for a partition of the thirty-acre lot, claiming one-fifth thereof, by descent. She claims that the dispositions of her brother Folkerd's will in favor of religious societies or institutions are void, and asks for a determination accordingly.

Cornelius Sebring left a will, the material portions of which are as follows:

"As for my worldly estate, after my decease [my will is that it] be disposed of in manner following:

"*Second.* I give to my four daughters * * * each one-sixth of my personal property not otherwise disposed of.

"*Third.* I give and bequeath my son Folkerd thirty acres of land on which he now lives, my young black mare, two hundred dollars in six months after my decease, and one-sixth part of my personal property not otherwise disposed of.

"*Fourth.* I give and bequeath to my son John the farm on which I now live, containing one hundred and one acres, my brown horse, bay horse, sucking colt, farm wagon, sled, and farming utensils, and one-sixth of my personal property not otherwise disposed of, provided he pay six hundred dollars legacy, support his mother, and pay fifteen dollars annually to my step-mother."

Folkerd C. Sebring by his will gave his wife a life estate in all his property, real and personal, and directed that on her death the whole should be sold by his executors, "and that the proceeds

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thereof be paid over to the following-named charitable societies in four equal portions."

One portion is allotted to "The American Board of Commissioners for Foreign Missions," a corporation duly incorporated by the State of Massachusetts for the purpose of propagating the Gospel in heathen lands.

Another is allotted to "The American Bible Society," and another to "The American Tract Society."

The two latter societies are New York corporations (Laws N. Y. 1841, pp. 41, 249). The general capacity of these three corporations to take, as contemplated by the testator, is not the question.

The other fourth part or portion is given in the following words:

"Another fourth part of all the proceeds * * * to be paid over to the Trustees of the Presbyterian House incorporated April 21, 1855, by the Legislature of Pennsylvania, to be expended under the direction and for the appropriate uses of the Home Mission Committee of the General Assembly of the Presbyterian Church in the United States of America."

The Legislature of Pennsylvania, on the said 21st day of April, 1855, passed an act, which, after reciting that "The General Assembly of the Presbyterian Church," which held its session in Philadelphia in May, 1854, had appointed John A. Brown and others named "Trustees of the Presbyterian House," created those persons and their successors a corporate body by the name of the "Trustees of the Presbyterian House."

The preamble recites a request that the act of incorporation "should contain a general provision authorizing the said trustees to hold, in trust for said assembly, any property committed to them by donations, bequests, or otherwise."

The 4th section of the act is as follows: "That the Trustees hereby incorporated, and their successors, shall be subject to the direction of the said assembly and their successors, have full power to manage all funds, property, and effects committed to their care, by gift, purchase, bequest, or otherwise, and to execute

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any trusts confided to them by said General Assembly, or their successors, in such manner as shall be deemed most advantageous, and not contrary to law or the intention of the donor or testator."

The action was tried at a Special Term in the county of Seneca, where the complaint was dismissed, with costs. On an appeal taken by the Plaintiff, a General Term in the Seventh District, modifying the judgment, declared that Folkerd took a fee-simple in the thirty-acre lot under his father's will; that the provision of Folkerd's will directing the sale was valid as a power in trust; that the bequests to the four societies "were valid to the extent only of one-half of the property *so bequeathed* to each." The General Term also directed, that after the death of decedent's widow, the whole of Folkerd's real and personal estate be converted into money, and after paying to the Plaintiff, the executors, and the four corporations their costs of this action, that one-eighth part of the net proceeds be paid to each of the four corporations.

Distribution of the residue of the proceeds was also directed among the individual Defendants who are descendants of C. Sebring.

The Plaintiff appeals to this Court from so much of the judgment as adjudges that Folkerd took a fee in the thirty-acre lot; that the Presbyterian House is entitled to any proceeds of his estate, and from the award of costs to the Defendants.

The four corporations appealed from so much of the judgment as reduced their respective bequests below one-fourth of the proceeds of Folkerd's estate, and also from the directions concerning costs.

John E. Seeley, of counsel for Plaintiff.

Samuel A. Foot, of counsel for Bible Society.

George A. Titus, of counsel for American Tract Society.

FULLERTON, J.—1. When Cornelius Sebring's will went into operation, the words of the third clause, devising the thirty-acre parcel to Folkerd, without superadded words of limitation, imported a life estate, and no more.

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The ancient and well-established rule of construction which produced this consequence, has from an early period been considered by eminent judges as almost invariably defeating the intent (Cowper, 355).

In Denne v. Page (11 East, 605, note), Lord Mansfield therefore says, that "Courts have been astute to find out, if possible, from other parts of a will, what the testator really intended; and it is with pleasure that they have found, in hundreds of cases, sufficient to warrant them in giving full effect to that intention."

At length, in 1830, the rule was abolished by statute in this State (1 R. S. 748, § 1, original paging. See Reviser's Note, 3 R. S. p. 601, 2d ed.).

In 1837 the British Parliament adopted a similar enactment (1 Vict. ch. 26, §§ 1 and 28).

And Mr. Justice Grier states, no doubt correctly, in 2 Black's R. 414, that the same beneficial change has been in like manner effected in most, if not all the States of this Union. Still, the rule must be applied to instruments which took effect during its existence; and hence the necessity of considering whether the devise in question is controlled by it.

Resort may be had to every part of a will in order to ascertain the sense in which the testator may have employed any particular word or clause on which a question arises; and accordingly, a number of circumstances appearing in this instrument are relied upon as evidence that the testator intended in this instance to give a fee.

He set out with a declaration of his will that his "worldly estate," after his decease, should "be disposed of in the manner following." He then gave the thirty-acre lot in question to Folkerd by its local description, without any words limiting the estate given; and he further gave another lot of land in like manner to his son John, and disposed of the whole residue of his personal estate in equal portions to the two sons and his four daughters, each taking one-sixth part thereof.

The fourth clause, containing the devise to John, contains also a bequest of sundry specific chattels, a sixth share of the residuary

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personal estate, and concludes thus: "Provided he [John] pay $600 legacy, support his mother, and pay $15 annually to my step-mother." This is a charge on John personally.

It is expressed as a condition, and there is nothing to confine it to the bequest, or to prevent its being interpreted as equally applicable to the devise.

John could not have accepted the gifts, or either of them, or any part of either, without becoming liable to the respective beneficiaries mentioned in the proviso, for all the duties and payments thereby charged upon him. This disposition gave John a fee in the farm devised to him, notwithstanding that the devising clause contains no words of limitation.

It may be proper to cite a few links of the unbroken chain of authorities by which this proposition is supported (Collier's case, 6 Coke, 16; Doe *v.* Holmes, 8 T. R. 1; Jackson *v.* Martin, 18 Johns. 36; Spraker *v.* Van Alstyne, 18 Wend. 205). King *v.* Ackerman (2 Black, 408) presented the point under circumstances essentially similar to those which attend this devise to John.

It arose on a devise of lands in New York. The devisee took a fee in other lands by force of certain inartificial words employed by the testator in connection with *that* devise; but the lands in question were devised to him by mere local description, without words of limitation; and certain legacies were charged upon him in general terms, not specially referable to either devise.

Evidence was offered that the land devised in fee was in value more than sufficient to pay the legacies. Its rejection was approved. The Court say: "It is clear that [the devisee] could not repudiate his obligation to pay the legacies by refusing to accept the gift [in fee] while he retained the lands in question. * * * A Court may look beyond the face of the will, where there is an ambiguity as to the person or property to which it is applicable; but no case can be found where such testimony has been introduced to enlarge or diminish the estate devised." Many authorities to the same effect are cited in 41 Barbour, pp. 535 to 540.

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It may be presumed that the devisor had no other real estate than the two parcels devised to his sons.

It is therefore apparent that the testator has not failed to make a complete disposition of all his property, in conformity with his declared intent, unless, indeed, the devise to Folkerd is to be deemed for life only. The intestacy can extend, at most, no further than to the inheritance or remainder in fee in the thirty-acre lot after the death of Folkerd.

The form of the introductory clause, and the fact that the residuary dispositions are of the entire personalty, and are expressly confined to personal estate, are relied upon as sufficient evidence of an intent to give a fee by the devise to Folkerd.

In Frogmorton *v.* Holyday (3 Burr. 1618) these circumstances concurred, and Lord Mansfield expressed the opinion that, taken together, they would cause a fee to pass under such an indefinite devise. In that case the devisee took a fee on another ground. Sir William Blackstone was of counsel against the devisee, and he gives his very able argument in his own reports.

He does not state that Wilmot, the only other Judge present, concurred with his senior on the point now in question; but represents him as using very peculiar language about "this kind of loose evidence being twisted together" (S. C., 1 Wm. Bl. 535). That case was decided in 1765. Eight years afterward, De Gray, Ch.J., with the unanimous concurrence of his associates, decided the other way in the Common Pleas, on a will presenting the same point precisely (Frogmorton *v.* Wright, 3 Wilson, 414; S. C., 2 Wm. Blackstone, 889).

As to such an introductory clause alone, the established doctrine is stated by Chancellor Kent, in 1 Johns. Ch. R. 498. It is "not sufficient without an actual devise. It must appear that the testator not only did not intend to die [intestate], but that he did not, in fact, die intestate." This has been so often and so emphatically adjudged in England and in this State that it ought not now be questioned (2 Jarman on Wills, 3; Lond. ed. p. 247; Barheydt *v.* Barheydt, 20 Wend. 576, 581; Harvey *v.* Olmsted, 1 Comst. 490).

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I cannot think that the complete disposition of the personalty improves the claim that Folkerd took a fee. Such introductory words are almost universally employed in wills drawn by unprofessional persons (2 Wm. Bl. 537).

A residuary clause is nearly as common, and the latter is generally intended to include personal property only, and is usually so limited in terms.

The introductory clause has been denied the effect now claimed for it, mainly because it is merely a common form to which testators are not supposed to give much attention. The same reasoning applies in a considerable degree to the residuary clause. If, from the circumstances relied upon in this connection, we should impute to the testator an intent to give a fee, by words which import a less estate, we must charge him with ignorance. It would certainly be at least as proper and more charitable to suppose forgetfulness. The first is, in some degree, a deliberate fault of life; the latter is but the accident of an hour, and that, perhaps, an hour of dying agony.

Adopting the strongly expressed views of Judge Gardiner in the case cited (1 Comst. 490), I conclude that a fee cannot be adjudged to have passed on this ground. The introductory clause thus coupled with the almost perfect completeness of the disposition, and the limitation of the residuary gifts to personalty only, have no greater just effect than to excite an apprehension that the testator may probably have intended to give his son Folkerd a fee.

But a mere conjecture of this sort should never be permitted to subvert the clear and positive title conferred by the Statute of Descents. The great respect entertained for its author has probably protected from criticism the opinion in 3 Burr.; but, as we have seen, it was disregarded in England soon after it was ventilated; and I cannot find that it has ever been adopted or approved in such a way as to re-enforce its authority. Ferris v. Smith (17 Johns. 223) presented the precise question.

The opinion in 3 Burr. was cited, but the Court, silently disregarding it, ruled that the devisee took only an estate for life.

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It was cited and treated in the same way in the analogous case of Doe v. Allen (8 T. R. 500, 501, 502).

I must regard that opinion as being overruled by these two subsequent decisions.

The clause devising the land to Folkerd includes, in the same sentence, a gift of personalty; and it is suggested that because he takes the latter absolutely, he should be held to take a like interest under the devise.

Very many adjudged cases have occurred presenting the same feature; but the decisions do not support the position asserted. The different nature of the property demands a different application of the testator's language.

Personal property is deemed of so evanescent a character that the law does not recognize any estate as existing in it (Williams on Personal Property, pp. 7, 186, 187). Hence a gift of a chattel is always absolute, unless expressly qualified; in respect to things real, the reverse has always been the legal intendment.

The fact that if the remainder in fee was not deemed to pass by the devise, the devisee himself would take part of it, is quite inconsequential; and I proceed to examine the only remaining ground on which a fee is claimed to have passed to Folkerd. The testator gave a farm to his son John in precisely the same terms which he employed to devise this thirty-acre tract to Folkerd. He imposed a charge upon John which, as we have seen, is conclusive evidence that he intended to give a fee to John.

Such a charge "doth plainly prove that the intent of the testator was, that the devisee should have an estate in fee-simple" (Reed v. Hatton, 2. Mod. 26). It is only as proof of the intent that the charge could so operate. Of itself, it works no change in the import of the devising clause. Courts have no legislative authority; they cannot forcibly enlarge the devise without the testator's consent, and beyond the meaning of his words, merely to effectuate what they suppose to be abstractly just and proper.

The only legitimate ground of decision in this class of cases is,

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that by making the charge upon the person of the devisee, the testator has certified on the face of the will his intention to give a fee. This involves a declaration on his part that, when using in the devise words which, in legal construction, would give only a life estate, he was ignorant of that rule, and supposed that these words were sufficient to give a fee. Then he must, of course, have intended that exactly similar words employed by him in the same instrument, for exactly a similar purpose, should have a similar interpretation and effect.

It is well settled that where a testator thus manifests in the will his conception of the meaning of a particular word, phrase, or formula, the courts will so interpret it where it occurs in other parts of the instrument (Den *v.* Trout, 15 East, 398; Cutter *v.* Doughty, 7 Hill, 305).

No particular method of expression is required of a testator. He must use correct language, or, if unable so to do, he must furnish within the will itself a key to the interpretation. The latter has been done in the present case; and, on this ground, I am of the opinion that Folkerd took a fee.

In Doe *v.* Snelling (5 East, 91), the will under consideration contained, as in the present case, two indefinite devises. The Court held, that under one of them a pecuniary charge in the will gave a fee. As to the other, which was not in question, Lord Ellenborough remarked that it "might probably be contended to pass only a life estate * * if any question should arise upon it."

Matthews *v.* Windross (2 Kay & Johnson, 406; 2d Jurist Rep., N. S. 926), and also Morris *v.* Lloyd (33 Law Journal, N. S., Exchequer, p. 202), were both cases upon wills presenting the same features as Doe *v.* Snelling; and in each case both of the indefinite devises were before the Court for construction.

In the last-named two cases the counsel of the devisees, in respect to whose devises there was no charge, argued for the position which I have here advanced.

In both cases the Court decided against that position. But the intimation of Lord Ellenborough, and the judgments in the other

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two cases, are too recent to be binding as authority, and they all labor under an infirmity which should greatly diminish their influence.

The charge in each instance, in point of fact, was on the land devised, and *not on the person of the devisee.*

Therefore, according to established principles, it did not change the effect of the devising clause, and no fee was given thereby. (See Sir James Mansfield's opinion in Doe *v.* Clarke, 5 B. & Puller, 350, approved by Kent, Ch.J., in Jackson *v.* Bull, 10 Johns. 148. See also Olmsted *v.* Olmsted, 4 Comst. 60; Mesick *v.* New, 3 Seld. 165, 170.)

In the case of Lee *v.* Withers (Sir Thos. Jones' Rep. 107), the will before the Court contained two indefinite devises of two separate pieces of land by a father to his two sons, John and James Moorey. The devises, as in this case, were indefinite, and were in the same terms, and there was a distinct charge on the person of James, which was rightly held to give him a fee.

Immediately after stating the facts, Jones says: "Et fuit resolve sans difficulty que John had estate forsque sa vie."

No argument of counsel is given, nor any reasons assigned by the Court; and the judgment given, as stated at the end of the report, is only on the devise to James.

The case is also reported in 2 Shower, 49, under the title of Lee *v.* Stephens and others.

In the latter report nothing appears concerning John or the devise to him, and the judgment is stated as having been on James' title only.

Sir Henry Pollexfen was of counsel for the heir-at-law in this case, and there is what might be called a report of it in Pollexfen's R. p. 539. It states the facts in full, and gives the following argument: "I take it that by the will, John Moorey had nothing but an estate for life; the words are, 'I give and bequeath to my son, John Moorey, my lands,' &c. There is nothing that gives any ground or cause for any constructive fee to pass by these words." No argument on the other side appears; and there is no reference to the Court, except a statement that it was adjudged

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James had a fee. Pollexfen's Reports were not published in his lifetime; and this, like many other quasi reports in the book, is evidently no more than a copy of Pollexfen's brief prepared before the argument, with a mere note of the decision at the foot. (See Wallace on the Reporters, p. 219, article Pollexfen.)

On the whole, I see no satisfactory evidence that the devise to John Moorey was ever debated in Court, or passed upon by the Judges. The contrary may well be the fact, and, if so, there is no English authority against the conclusion at which I have arrived. Even if we are bound to believe that Chief Justice Scroggs and his companions, in the thirty-first year of Charles the Second, did consider the point, this Court may rightfully reconsider it, and adopt a more sound and just interpretation.

The intent to give a fee to Folkerd is manifest; and it is clearly expressed by the testator himself on the face of the will.

Precedents, if they existed, could hardly justify a refusal to see it, and adjudge accordingly.

2. The beneficiaries contemplated by the third clause of Folkerd C. Sebring's will are plainly therein designated as four "societies." The ultimate and real beneficiary, under the direction to pay over to "The Trustees of the Presbyterian House," is not that corporate entity, nor the individual persons composing it, but some "society."

By turning to the Pennsylvania statute referred to by the will, and reading it as if incorporated with the will (21 N. Y. Rep. 330, 331), we find that the "society" for whose benefit this direction is given is the whole mass of persons constituting the Presbyterian Church in this country, or their General Assembly, viewed as a continuous body, or a particular session of that Assembly which met in Philadelphia in 1854, or a certain committee of such General Assembly, viewing the latter in one or other of the aspects just specified. The will gives this committee's title as "The Home Mission Committee."

None of these bodies are incorporated; and it may be assumed that a direct bequest to any of them, or to an individual for their

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use, in the general form in which they are referred to by this will as beneficiaries, would be void for uncertainty.

But it is further contended, that although the bequest is to a corporate body, it is still void because the beneficiaries are thus undefined, and are not themselves incorporated.

It is asserted that the corporation has no interest, and is a mere conduit-pipe, through which the money is to flow into the hands of the ultimate beneficiaries.

This is not exactly the fact. By the will, the fund is to be "expended" under the *direction* of the beneficiaries. This implies the very reverse of a simple payment over to the latter.

By the act, this corporation is to "manage" all funds thus coming to its hands. This, to be sure, must be done "subject to the direction of the General Assembly, or their successors."

In both these respects the will and the act substantially correspond. The latter, it is true, enjoins upon the Assembly the practice of issuing its directions to the corporation through a certain specified committee of its body; and perhaps it also requires the Assembly to devote this portion of its funds to uses supervised by that same committee. The corporate body, however, is to be the managing and disbursing trustee of the bequeathed fund.

As a corporate entity, it is to hold the custody thereof, and the legal title thereto.

Both in respect to real and personal property, it is established doctrine, that a trustee to receive, manage, and disburse, or even with less powers, has the legal title, and is, in contemplation of law, the owner of the property. It must, however, be conceded that the corporate body, and the corporators, were without any actual right to any beneficial enjoyment; they merely sustain a burden for the enjoyment of the society referred to. But it seems to me that the absence of such right in the corporation, or its corporators, is not material; for such is the condition of most charitable corporations.

The beneficiaries of funds held by incorporated hospitals are persons not entitled to membership in the corporations. And it

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rarely happens that in such hospitals the corporate body, or any individual member thereof, has any beneficial interest. The fact appearing in this case, that the corporation must, in all substantial respects, obey the orders of the unincorporated and fluctuating multitude for whose use it was created, or the orders of the committee thereof, can have no influence on the validity of the bequest.

Ordinary corporate bodies having charge of the temporalities of our churches are very nearly in this condition; and if they were absolutely and entirely in it—that is to say, if the trustees were forbidden to disburse a dollar without asking the directions of a mass meeting of those who, for the time being, might chance to be attending worshippers—the corporate body would not the less satisfy the requisites of our law concerning gifts to charities, in the particulars now under consideration. The objections to the capacity of this corporation to receive the testator's intended bequest, seem to me, therefore, to be unfounded.

They originate in conceptions impracticably refined and subtle.

Such rigorous constructions are not adapted to the actual concerns of life. The cases cited have been examined, as also the learned and elaborate opinion of the present Chief Judge (Davies) in Downing v. Marshall, reported by Mr. Howard (23 Practice Reports, p. 10). The Plaintiff virtually admits every proposition required to support the bequest to "The Presbyterian House," except what may be involved in the nice criticism referred to, and that is not, in my judgment, supported by anything found in these citations.

3. The act relating to wills (Laws of 1860, p. 607) enacts that "No person having a husband, wife, child, or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious, or missionary society, association, or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts (and such devise or bequest shall be valid to the extent of one-half, and no more)."

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The testator left no relative or connection named in this act, except a wife, and she consented to the disposition.

The societies contend that the act was made exclusively for the benefit of the persons referred to by it, and that no others can insist upon the prohibition, or claim its enforcement.

The General Term held, and, I think, correctly, that the prohibition is peremptory, and may be insisted on by any person who would derive a benefit therefrom.

The language is absolute; and if the Courts have power in any such case to judge concerning the probable motives of the Legislature, and may imply, accordingly, an exception to the positive terms of a statute (on which no opinion need now be expressed), I am unable to discover any safe ground for such a proceeding in this instance.

Consistently with this act a testator, having the relatives and connections specified, may give half of his estate to a nephew, or any remote collateral relative, or, indeed, to entire strangers, and give the other half to the societies described.

It is, therefore, quite clear that it was not designed to compel testators to provide for their families. If a man whose entire estate consisted in realty, and who had none of the relatives mentioned, and only a wife, should die without a will, his widow would take only a life estate in one-third of his lands.

Yet in such a case the statute of 1860 avoids the devises which such a person might have made, to a much greater extent than is necessary to protect all benefit which the widow could possibly have derived from an intestacy.

The widow may have been barred of dower by a jointure (1 R. S. p. 741, §§ 9, 10, 1st ed.). She may have been incompetent to take from alienism; yet, in either of these cases, if the construction claimed be correct, her consent alone would give effect to a devise not otherwise sustainable.

So to hold would not be implying an exception, from the nature and reason of the thing (1 Johns. Cases, 131).

It would be repugnant to both, and violative of our plain duty, to administer the law as we find it written.

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The reasons assigned by Judge T. A. Johnson in support of the judgment below on this point, are satisfactory and conclusive (Harris v. Slaght, 46 Barb. 470).

4. The enactment in question is, that no person shall "by will or testament give or bequeath" to any society of the classes named, "more than one-half part of his or her estate, after payment of his or her debts."

As the parties concur, and perhaps rightly, in construing this act as prohibiting dispositions to these purposes, by the same testator, which, taken together, exceed one-half of his entire estate, I will assume that such is the law. No doubt it was the legislative intent.

The Supreme Court determined that the societies can take only one-half of the proceeds which may be realized on a sale of the estate at the widow's death.

On this a question arises whether the statute, in speaking of one-half of the testator's estate, is not to be regarded as referring to the estate left at the testator's death.

Upon the words and the reason of the thing the affirmative is quite clear. No higher authority can be found; nor does a resort to precedents seem needful on a point so plain.

If a man leaving two infant children should give each an estate for life, with remainder in fee to his issue, should limit cross-remainders in fee in default of issue, and make an ulterior disposition for a sale, and the payment of proceeds to charitable societies on failure of issue living at the survivor's death, the judgment below assumes that, on the occurrence of the latter contingency, the societies could take only half of the value at that time.

Nearly or quite a century might have elapsed, and, owing to depreciation or other causes, the proceeds might not amount to one-tenth of what was the value at the testator's death. Yet it is supposed that one-half of this diminished fund should go as upon an intestacy to the next of kin. I do not think so.

The Roman Lex Falcidia forbade a testator to give more in legacies than three-fourths of his effects; so that there must remain to the heir one-fourth (Justinian's Institutes, book 2,

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chap. 22; see Cooper's edition, page 173; see the law itself in the Digest, lib. 35, tit. 2, l. 1).

Like the act now under consideration, this law does not, in terms, specify any time for the valuation.

But, commenting upon it, the Institute speaks as follows:—

"The law Falcidia looks to the quantity of his estate at the time of the death of the testator; and therefore, if he who is worth but an hundred aurei at his decease, bequeath them all in legacies, the legatees must suffer a defalcation; for they will be entitled to no advantage, although the inheritance, after the death of the testator, and before it is entered upon, should so increase by the acquisition of slaves, the children of female slaves, or the product of cattle, that after a full payment of the 100 aurei in legacies an entire fourth of the whole estate might remain to the heir; the legacies, notwithstanding, would still be liable to a deduction of one-fourth.

"On the contrary, if the same testator had bequeathed only 75 aurei, then although, before the entrance of the heir, the estate should so decrease by fire, shipwreck, or the loss of slaves, that its whole value should not be more than 75 aurei, or less, yet the legacies would still be due without defalcation" (Justinian's Institutes, book 2, chap. 22, § 2; see Cooper's ed., p. 174, and also the editor's note on this § 2 at page 533).

In Sander's Institutes of Justinian (p. 336, 3d ed., 1865), it is said that "the calculation under the Lex Falcidia was made at the time of the testator's death."

The subject is treated of to the same effect, and with great fulness and detail, by Domat (Domat's Civil Law, part 2, book 4, title 3, § 1, articles 3706, 3707, 3708; see Boston ed., 1850, edited by Cushing, vol. 2, p. 588).

When a testator disposes of his property in such a manner that one-half of the corpus can be severed from the other at his death, the administration under the statute of 1860 is very simple. But if (as he may) he devises it by way of successive estates, or interests, the task of distribution between his next of kin and the charitable societies to whom he has bequeathed in excess of his

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powers may be somewhat more difficult. Still it is not impracticable.

It should be adjudged that the four societies will not be entitled to receive a greater sum in the whole, from the proceeds of the sale directed by Folkerd C. Sebring's will, than would be sufficient, on a proper calculation, to pay and satisfy at that time a debt then yet remaining unpaid, which, at the testator's death, was equal in amount to the then value of one-half of the testator's estate, over and above his debts.

And also, that if there should be any residue of such proceeds, the costs awarded in the Court below be paid out of the same, and the balance thereof distributed to the next of kin of the said testator, in the proportions specified in the judgment of the General Term.

With these modifications, the judgment appealed from should be affirmed.

These are my views of this case, and my brethren concur in them, with this exception:

They are of the opinion that the case of Van Derzee v. Van Derzee (36 N. Y. Rep. 231) controls, and requires a decision that Folkerd C. Sebring took a life estate only.

I am unable to acquiesce in that conclusion. But it follows that the judgment of the General Term, so far as it holds that Folkerd took a fee, must be reversed; and that with the modifying adjudication above suggested, the judgment must be in all other respects affirmed.

None of the parties are to have costs on this appeal, and the proceedings are remitted to the Supreme Court, with directions to enter judgment accordingly.

Judgment that Sebring took only a life estate, and that on his decease the estate in the thirty acres mentioned descended to the heirs of his father, as in case of intestacy.

JOEL TIFFANY,
State Reporter.

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JOHN STEWART, SURVIVOR OF PETER STEWART, RESPONDENT, *v.* HIRAM BROWN, SHERIFF OF ALLEGHANY CO., APPELLANT.

Execution—Statutory Exemption—Team of Householders—Joint Debtors and Owners.

The language of the statute, exempting from levy and sale on execution certain property of the judgment-debtor, should be construed in harmony with the humane and remedial purposes thereof.

Where two householders own a team between them, which, if owned by either individually, would be exempt under the statute, it is likewise exempted as firm property.

APPEAL from the Supreme Court. The action was for the recovery of a pair of horses and a double harness.

The Defendant claimed to justify the taking under an execution against the Plaintiffs in favor of Miller and Grainer.

The only question in the case was, whether the team was exempt from seizure and sale on execution.

The cause was tried before Alexander Storrs, as sole referee. The facts as found were substantially these:

The Plaintiffs were partners in the ownership of the horses and harness, which were worth $160. They had no other property except a few articles of household furniture, of trifling value. Each of them was a householder, and each had a family for which he provided. Both the Plaintiffs were teamsters, and they respectively derived their support from the use of the horses and harness, having no other means to provide for their families. The judgment in question was for a firm debt; and the Defendant, under the execution issued thereon, took the team, claiming that it was subject to levy and sale.

The Plaintiffs replevied it, claiming that it was exempt property. The referee gave judgment for the Plaintiffs, which was affirmed on appeal to the General Term in the Eighth District.

The opinion of the Court was delivered by Mr. Justice Daniels.

E. B. Vedder for Appellant.

Wilkes Angel for Respondents.

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PORTER, J.—The argument submitted for the Appellant is ingenious; but its fallacy is apparent, in view of the conclusions to which it tends. If it proves anything, it is that the property of a firm is not owned by the persons who compose it, either collectively or otherwise.

It certainly does not belong to any one else, and if the Appellant is right, the title is in a state of abeyance. If the partners have such an ownership as subjects the property to seizure on execution, they have also such an ownership as entitles them to claim its exemption, in a case plainly falling within the terms and intent of the statute.

In the instance before us, the complaint alleges, and the answer admits, that the horses and harness in question were the property of the Plaintiffs.

The facts found by the referee meet all the requirements of the act exempting from levy and sale the necessary team of "any person being a householder or having a family for which he provides" (4 Edmond's Statutes at Large, 626).

It is insisted that the clause applies only to a *several* owner, as the word "person" is used in the singular number. The short answer is, that by a provision in our general law, when a statute refers to any matter or person, by words importing the singular number, several matters or persons shall be deemed to be included, unless such a construction would be repugnant to the general language employed (2 R. S. 778, § 11).

In respect to articles otherwise within the terms of the act, such ownership as suffices to make them subject to seizure brings them within the exemption. If each of the Respondents had owned a pair of horses, both teams would have been exempt, upon the state of facts found by the referee. It would be an obvious perversion of the statute to hold that the Plaintiffs forfeited its protection by owning but a single team between them, used for the common support of both.

The language of the act should be construed in harmony with its humane and remedial purpose. Its design was to shield the poor, and not to strip them.

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The interest it assumes to protect is that belonging to the debtor, be it more or less. The ownership of the team may be joint or several; it may be limited or absolute.

Whatever it be, within the limitations of the statute the debtor's interest is exempt, in view of his own necessities, and of the probable destitution to which its loss might reduce a family dependent on him for support.

The judgment should be affirmed.

All the Judges concurring.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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STEPHEN W. HOWELL, APPELLANT, v. THE CITY OF BUFFALO, RESPONDENT.

Taxation—Powers of Legislature—Municipal Officers.

The people have not ordained that taxation shall be general, so as to embrace all persons or all taxable persons within the State, or within any district or territorial division of the State, nor have they forbidden that it shall be apportioned according to the benefits which each taxpayer is supposed to receive from the object on which the tax is expended.

The Legislature have authority to authorize a city to make an apportionment of a tax upon the profits of persons benefited by an improvement made, and for which the money had been expended, even though the city had paid for the improvement, and sought to raise the money by a tax to reimburse the corporation.

PARKER, J.—This action was brought in the Superior Court of the city of Buffalo, under the authority of chapter 438 of the Laws of 1864, to test the validity of a certain assessment made by the city upon the lands of the Plaintiff, and others, by virtue of an act of the Legislature of this State, passed April 21, 1863, entitled "An act authorizing the Common Council of the city of Buffalo to make re-assessments to defray the expenses of local improvements on Niagara Street in said city." (Chap. 196, Sess. Laws of 1863.)

The Defendant is a municipal corporation, and has power, under certain restrictions, to cause streets to be paved, and other local improvements to be made, and the expense thereof to be assessed upon the parcels of land in such city to be benefited by the improvement, in proportion to such benefit.

As appears by the complaint, in 1859 the Defendant ordered Niagara Street to be graded and paved, and the expense thereof to be assessed upon the real estate benefited thereby.

The assessment was accordingly made, amounting to $37,762, whereby the Plaintiff's lands, among others, were assessed. The Defendant contracted for the making of the improvement at the sum above mentioned, and it was made, and the contractor fully

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paid and satisfied therefor, $8,700 of the required sum being received from parties assessed, who voluntarily paid their assessments; and the balance, over $29,000, being borrowed from the general fund of the city. The lands—the assessments on which were not paid, including the Plaintiff's—were sold for the non-payment of the respective assessments thereon, and were bid off at such sale by the Defendant, in default of other bidders, pursuant to a requirement in its charter, for the term of 100 years. The general fund was subsequently made good for the sum so borrowed from it by the issue and negotiation of bonds of the city, pursuant to another provision of the charter. The order directing the said improvement to be made, was adjudged by the Superior Court of the city of Buffalo, in November, 1862, to be without jurisdiction, and void, by reason of the want of the certificate of the city assessors, required by section 19 of title 8 of the city charter, as amended by the act of 1854. (Sess. Laws of 1854, chap. 69.)

Thereupon the Defendant applied to the Legislature of the State and procured the passage of the act of April 21, 1863, above referred to; which act, after reciting the fact of the aforesaid order for the grading and paving of Niagara Street, in said city of Buffalo, and of the said assessment, and that the same had been declared null and void; and that the said improvement had been fully completed, and that it was just and equitable that the expense thereof should be paid by the owners of the real estate benefited thereby, and that the same should not be a charge upon all the taxable property of said city, enacted that the Common Council of the city of Buffalo, for the purpose of defraying the expenses of said improvement, are authorized and empowered to re-assess the sum of $32,266.76 on the real estate benefited by said improvement.

On the 21st of September, 1863, the Common Council of the city of Buffalo directed the city assessors to assess that sum upon the real estate in said city benefited by said improvement, in proportion to the benefit resulting therefrom. Whereupon the assessors, pursuant to the authority of said direction and said act, made a re-assessment of said sum on said real estate, including the

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real estate of the Plaintiff, in the complaint described, which re-assessment was confirmed by the Common Council of said city, and the roll of said re-assessment was placed in the hands of the receiver of taxes for said city for collection. The Plaintiff avers, that if the sum of $2,000 and proceeds (parcel of said re-assessment of $32,-266.76) so assessed upon the premises of the Plaintiff shall not be paid, the said several parcels of land of the Plaintiff will be sold for such non-payment. The Plaintiff demands judgment declaring the said re-assessment, as to the lands of the Plaintiff, illegal and void; and that the Defendant and its agents be perpetually enjoined from enforcing or collecting the same. The Defendant demurred to the complaint, and the Court, in General Term, sustained the demurrer, and gave judgment for the Defendant.

The ground upon which the Plaintiff resists the enforcement of the re-assessment is, that the act of the Legislature, under and by virtue of which it was made, is unconstitutional and void.

The doctrine that a statute which authorizes a municipal corporation to grade and improve streets, and to assess the expense among the owners and occupants of lands benefited by the improvement, in proportion to the amount of such benefit, is constitutional, as was held by this Court in the People v. Mayor, &c., of Brooklyn (4 Coms. 419), is not controverted by him, but that inasmuch as the assessment in question was made after the improvement had been paid for by the city, and after the Plaintiff had come into the full enjoyment of its benefits, and the money raised by such assessment was, by the act, required to be paid into the treasury of the city, for the purpose of reimbursing it for moneys advanced to defray the expenses of said improvements, it was not an assessment to pay for the improvement, and so not within the rule of the case above referred to. And his proposition is, that to make the assessment valid, the benefit must be conferred at the time, and as a result and necessary consequence of the making and collection of the assessment; that if this is not so it violates that part of section 6 of article 1 of the Constitution which is as follows: "Nor shall private property be taken for public use, without just compensation." It is settled by the

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case above cited, that an assessment for local improvements, when made upon the owner of lands benefited in proportion to the amount of such benefit, is an exercise of the taxing power. The levying and collection of taxes is not within the meaning of the clause of the Constitution referred to—the taking of private property for public use; but this provision applies to the taking of property under the exercise of the right of eminent domain.

This is evident from the following provision in the next section of the article (art. 1, § 7): "When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a Court of Record, as shall be prescribed by law." This requirement is clearly inapplicable to the collection of taxes, and shows that the prohibition against the taking of private property for public use, without just compensation, is not contravened by the act in question.

It is equally manifest that the other constitutional prohibition, also contained in art. 1, § 6, that no person shall "be deprived of life, liberty, or *property*, without due process of law," could not have been intended as a restriction upon the taxing power of the Legislature, and has not been violated by this act.

In discussing the power of taxation vested in the Legislature, the learned Judge who gave the opinion of this Court in the case of The People *v.* Mayor, &c., of Brooklyn (supra), said: "It must be conceded that the power of taxation, and of apportioning taxation, or of assigning to each individual his share of the burthen, is vested exclusively in the Legislature, unless this power is limited or restrained by some constitutional provision. The power of taxing, and the power of apportioning taxation, are identical, and inseparable. Taxes cannot be laid without apportionment; and the power of apportionment is, therefore, unlimited, unless it be restrained as a part of the power of taxation. There is not, and since the original organization of the State government there has not been, any such constitutional limitation or restraint. * * The people have not ordained that taxation shall be general, so

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as to embrace all persons, or all taxable persons within the State, or within any district or territorial division of the State. * * * Nor have they ordained or forbidden that a tax shall be apportioned according to the benefit which each taxpayer is supposed to receive from the object on which the tax is expended. In all these particulars the power of taxation is unrestrained. * * * Taxation is sometimes regulated by one of these principles [or rules of apportionment], and sometimes by another; and very often it has been apportioned without reference to locality, or to the taxpayer's ability to contribute, or *to any proportion between the burthen and the benefit.*"

The doctrine thus stated accords with what was said by Chief Justice Marshall in Providence Bank *v.* Billings (4 Peters, 514): "However absolute," he says, "the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burthens; *and that portion must be determined by the Legislature.* This vital power may be abused; but the interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise legislation generally."

In the case of Thomas *v.* Leland et al. (24 Wend. 65) the Defendants were prosecuted for breaking into the Plaintiff's store, and for taking and carrying away his goods. They justified as commissioners for assessing, levying, and collecting a tax in pursuance of an act of the Legislature (Sess. Laws, 1835, chap. 309) which authorized them to assess upon the real estate in the city of Utica the sum of $41,000, which had been secured to be paid into the treasury of the State by the bond of A. B. Johnson and others, as an indemnity to the State for the expense of changing the northern termination of the Chenango canal, from Whitesboro' to Utica—alleging that the acts complained of were done in the collection of such tax. The Plaintiff's counsel insisted that the act was void, as it authorized the taking of Plaintiff's property without just compensation, to pay the debt of the obligees in the bond. But the Supreme Court held the act valid, and in

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giving the opinion of the Court, Judge Cowen remarked: "I admit that the power of taxation may be abused, but its exercise cannot be judicially restrained, so long as it is referable to the taxing power. The only check lies at present in that power being usually exerted on considerable bodies of men who possess a control, in a greater or less degree, over its agents."

In Brewster v. The City of Syracuse (19 N. Y. R., 116) this Court held that the Legislature has the power to authorize the levy of a tax, for the purpose of paying to one who has constructed a municipal improvement an addition to the contract price, which the corporation itself was, by its charter, forbidden to pay; and the foregoing doctrine of the case of The People v. Mayor, &c., of Brooklyn was re-asserted. See also The Town of Guilford v. The Board of Supervisors of Chenango County (3 Kern. 143).

The power upon the subject of taxation accorded by these cases to the Legislature must be conceded to it, as well upon their authority as upon the justness of their reasoning on the subject. Now, without adverting to the undoubted power of the Legislature, in certain cases, to pass laws for the purpose of validating the acts of public officers and others, done without due conformity to pre-existing laws, and waiving the consideration of the question in reference to such power, if we look at the material circumstances of the case before us, we shall see that the municipal corporation had, at the time of the passage of this act, a clear necessity for a tax. It had borrowed the money necessary to pay for the improvements made under its former proceedings, and this it was bound to pay, notwithstanding those proceedings had been adjudged unauthorized and void. No one can doubt that the raising of the money to pay this indebtedness was within the legitimate scope of the taxing power; nor that it was within the constitutional power of the Legislature to pass an act authorizing a special tax for the purpose.

These lands were within the city, and therefore, under the strictest limitation of the taxing power, liable to bear a proportion of this burden. What proportion, it was, as we have already

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seen, the province of the Legislature, and not of the Courts, to determine.

The Legislature was not bound to apportion the tax among the taxable persons within the city, but might, according to its own view of justice and right, apportion the whole tax among a part of such persons. It saw fit to apportion the tax upon the owners of the lands which had been benefited by the improvements, in proportion to the amount of such benefit. As it is impossible, under the doctrine above adverted to, to say that it had not the constitutional power so to do, so it can scarcely be contended that in so doing it violated any principle of justice or right. Upon the question of natural as well as legal justice and right, the circumstance that the improvements had been paid for by the city, and that the Plaintiff was in the enjoyment of them, before the assessment of this tax, does not, as I can see, affect the apportionment with injustice and wrong, any more than if it had been made in anticipation of the improvements. It is quite true that, notwithstanding the improvements, when made, were a benefit to the Plaintiff, the city, by making them, acquired no right of action against the Plaintiff to pay for such benefit, and it may be true, as the learned counsel of the Plaintiff has argued, that in making them the city assumed the relation of a trespasser against the Plaintiff. Yet the act does not undertake to interfere with these legal relations existing between the parties. Whatever rights of action existed between them, growing out of the making of the improvements, are left untouched by the act, and no new ones are attempted to be created. Neither is there, as the Plaintiff's counsel insists there is, any interference with any other vested rights of the Plaintiff, by seeking to re-establish against his lands a charge from which they had been released. The decision of the Court, declaring that charge unauthorized and void, was not overruled, nor in any manner interfered with; and there has been by the Legislature, in the passing of the act, no encroachment in any way upon the functions of the judiciary. It is simply an exercise of the taxing power, in a mode, as we have seen, within the constitutional scope of legislative authority—

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induced, it is true, by the failure of the former proceedings, but in no other sense retrospective, and in no objectionable sense retroactive. It does not reach back and attempt to legalize the tax which was illegally imposed, and by the Court declared void, but does precisely what might have been done if there had been no previous attempt on the part of the city to collect the expense of the improvements out of the property benefited.

I can see no good ground for saying that the act is unconstitutional. The judgment of the Court below must therefore be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

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THE PEOPLE, ETC., DEFENDANTS IN ERROR, v. FREDERICK H. WENTZ, PLAINTIFF IN ERROR.

Felony—Evidence—Confessions of Criminal.

Where a prisoner, being arrested and imprisoned on charge of having committed a felony, makes a free statement of his guilt, without any influence having been used to induce the confession, or to interfere with the free voluntary action of the prisoner's mind, such a statement may be used as evidence on the trial of the prisoner for the alleged felony.

The remark of an officer to the prisoner that he was in a bad fix, that he was caught at last, and an inquiry as to who were the others with him, had no tendency to influence the mind of the prisoner improperly, so as to render his confession thereupon inadmissible as evidence against him.

D. J. Mitchell for Plaintiff.

O. W. Chapman, District Attorney, for the People.

DAVIES, CH.J.—The prisoner was tried on the civil side of the Supreme Court, at a Circuit held in the county of Broome, in March, 1867, and convicted of the crime of arson; and the General Term denied a new trial, and the Defendant was sentenced to the State prison.

He now brings a writ of error to this Court. It is claimed that the Court, upon the trial, erred in allowing the People to prove the confessions made by the prisoner to the witness Martin, who at the time was a policeman.

It is also urged that the Court erred in permitting the same witness to testify to another conversation with the prisoner, in which conversation the prisoner requested the witness to go and request the prisoner's father to visit him at the jail.

It is also claimed that the Court erred in permitting the witness to testify as to what occurred when the father and the counsel of the prisoner were present; and it is also claimed that the Court erred in permitting the People to give evidence of a distinct and different felony committed by the prisoner, other than that charged in the indictment, and for which he was upon trial.

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The witness did not have the prisoner in his charge, but went into the rooms occupied by him in the jail.

He testified that as he went into the room he made the remark that he (the prisoner) was in a bad fix, and had got caught at last, or something like that; and that the witness then asked him to tell who the others were; and in the course of the conversation with the prisoner, he (the prisoner) asked the witness if he had got Delany; he told him "no."

The prisoner then asked him if he had got Delany and David Gray; and the witness asked the prisoner if they knew anything about it, and he said they did.

The witness then asked the prisoner what was the first fire he was interested in. He said the first fire was his father's barn, that he had anything to do with, and that the next was Pugsley's barn, near by, and he said that he and David Gray set that on fire.

The witness testified that he made no promise to the prisoner, nor held out to him any inducements whatever to make the confession.

The confessions of the prisoner were wholly voluntary, and made uninfluenced by any threat, menace, promise, or other influence.

It is no ground of objection that they were made to a policeman. He had not arrested the prisoner, and did not have him in his custody at the time of this conversation.

Selden, J., in the case of The People v. McMahon (15 N. Y. 384), very clearly states the principle which should govern in the admission of the confessions of persons charged with crime. He says: "The first distinction which the law makes is between a declaration or statement made before, and one made after the accused was conscious of being charged with or suspected of the crime. If before, it is admissible in all cases, whether made under oath or without oath, upon a judicial proceeding or otherwise; but if made afterwards, the law becomes at once cautious and hesitating. The inquiry then is, was it voluntary? For unless entirely voluntary, it is held not to be admissible." He then

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proceeds to define what is meant by the term voluntary. He says: "The word is evidently not in all cases used in contradistinction to compulsory, because a confession obtained by either threats or promises, from any one having authority over the accused, or concerned in the administration of justice, is uniformly held to be inadmissible. However slight the threat, or small the inducement thus held out, the statement will be excluded as not voluntary. It is plain, therefore, that in such cases at least, by voluntary is meant proceeding from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous disturbing cause." And the learned Judge states the reason of this exclusion to be, that when the law rejects a disclosure made under oath by a person charged with crime, it does so, not because any right or privilege of the prisoner has been violated, but because it is deemed unsafe to rely upon it as evidence of guilt. And this is strongly to be inferred from that class of cases in which it has been held, that although a confession has been obtained by stratagem, by fraud, by violation of confidence, or even of an oath, still, if reliable, the law will avail itself of it.

And he cites, in support of this principle, Barley's case (cited in Phillipps on Ev., 427) as having been decided in Easter Term, 1818; mentioned also by Roscoe & Starkie, who say the conviction was afterwards approved of by the Judges.

When the prisoner was told untruly, and as an artifice, when in jail, that his accomplices were in custody—upon hearing this, which was said to induce a confession, he confessed.

The confession was admitted in evidence. In Rex v. Derrington (2 Car. & Pa. 418), the prisoner, while in jail, having written a letter to his father, asked the turnkey to put it into the post, which he promised to do; but instead of this, the turnkey delivered it to the magistrates. The letter was offered in evidence, and objected to, but admitted.

So in Rex v. Shaw (6 Car. & Pa. 372), where the person to whom the confession was made had taken an oath that he would not reveal it; this was held to be no objection to the evidence.

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A confession is admissible although it is elicited by questions put to the prisoner by a magistrate, constable, or other person.

The leading authority on this point is Wild's case (1 Moody, C. C. 452).

The person having the prisoner (a boy about fourteen) in charge, told him to kneel down and tell the truth in the presence of the Almighty. He did so, and confessed to pushing the children, with whose murder he was charged, into the pit.

At a meeting of all the Judges in 1835, four only absent, they held that the confession was strictly admissible.

In Thornton's case (1 Moody's C. C. 27, Trin. Term, 1824), which came before the Judges, a confession was held admissible, made by a boy only fourteen years old, to a chief officer of police, by whose directions he had been apprehended without a warrant, and obtained in answer to questions put to him by the officer, and at a time when the boy had been without food for nearly an entire day. Seven of the Judges held the confession rightly received, for the reason that no threat or promise had been used. Three Judges were of a contrary opinion. In Gibney's case (Jebb's Crim. Cases before the Twelve Judges of Ireland, p. 15), decided in 1822, a confession was held unanimously admissible which was elicited by questions put to the prisoner by two constables, in whose custody the prisoner then was on his way to jail. One asked him, "Did you kill the child?" The other, "Were you not a terrible man to do such a thing?"

Both these questions were asked before the confession was made. The constables told him several times, before he confessed, what a terrible offence he had committed—that it was a terrible thing for a man to murder his own child.

For the cases of a similar character, see Joy on Confessions, p. 34, et passim—Law Library, vol. 24, N. S.

So also a confession is admissible although it is elicited in answer to a question which assumes the prisoner's guilt, or is obtained by artifice or deception.

In Thornton's case (1 Moody's C. C., p. 28), a chief officer of police, by whose directions the prisoner had been apprehended,

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said to the prisoner in custody, that "in consequence of the falsehoods the prisoner had told, and the prevarications he had made, there was no doubt but that he had set the premises on fire;" and after questioning him whether any person had been connected with him, added: "He would not have told so many falsehoods if he had not been concerned in it;" and again asked, "Whether any person had induced him to do it?"

The prisoner then made a confession. Seven out of the ten Judges held that the confession was rightly received.

Lord Denman, Ch.J., in Arnold's case (8 Car. & P. 622), says that the true test of the admissibility or inadmissibility of a confession is, whether any inducement was held out to the prisoner to confess himself *untruly* guilty.

Applying these principles to the confessions made by this prisoner, we see that none of them were overlooked or misapplied in the admission of them. The utmost that can be said of any remark made by the officer was, that it assumed the prisoner's guilt.

This, we have seen, furnishes no ground for the rejection of the confession. There being no inducement, promise, threat, or menace used to obtain the confession, or influence its being made, it is very clear, upon principle and authority, that it was properly admitted.

We do not see that any rule of evidence was violated in admitting the answer of the witness, that Becker, the counsel of the prisoner, was present in the jail with him at the same time the witness and the father of the prisoner were present.

I do not understand the witness as detailing anything the prisoner said to his counsel; and he must certainly have been asked that, or attempted to give that, before the principle could be invoked that such statement was a privileged communication.

Such privilege has no application to anything that was given in evidence, or offered to be given in evidence upon this trial. Besides, any statement made by the prisoner to Becker, his counsel, in the presence and hearing of the prisoner's father, and of the witness, could not partake of the character of a privileged communication.

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Neither is there any foundation for the objection now urged, that the Judge upon the trial admitted evidence of a distinct felony not charged in the indictment, to wit, that the prisoner burned his father's barn.

When the witness was asked about a further conversation with the prisoner, he testified: "I then asked him what was the first fire he was interested in." This was objected to, received, and excepted to. The witness answered: "He said the first fire was his father's barn, that he had anything to do with, and that he and Jerome Dean——"

Here the witness was stopped, and did not further answer the question. When the witness was again asked directly what the prisoner said about he and Dean setting the fire, it was objected to on the ground that the question related to another offence, and one for which he was not on trial. The Court sustained the objection, and excluded the evidence.

It is thus seen that the moment the attention of the Court was called to the ground of the objection, the evidence was excluded. And if the counsel for the prisoner had thought the former answer, given in part, was open to the same objection, it was his duty to have moved the Court to strike out that testimony; and if the same had been refused, to have taken an exception.

On a careful consideration of all the exceptions taken upon the trial, we think them untenable, and that the judgment of the Supreme Court must be affirmed.

GROVER, J.—The question whether the motion for a new trial, on the ground of newly-discovered evidence, should have been granted, is not reviewable in this Court. Although the indictment was removed into the Supreme Court, and tried at the Circuit, that does not enlarge the powers of this Court.

Questions of law only can be examined here (Selden v. Delaware & Hudson Canal Co., 29 N. Y. 635). This motion was addressed to the sound discretion of the Court, and its determination by the Supreme Court is final. None of the exceptions to the charge were well taken. It is entirely obvious that the testimony

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of Wentz, that the Defendant was at the store from seven o'clock in the evening of the night of the fire until the alarm was given,—and the testimony of the witnesses, that he was passing the streets to the engine-house, where he arrived some little time before the alarm, and where, they testify, he was at the time of the alarm,—could not all have been true. It was in direct conflict, and one or the other must have been false, either through mistake or by intention.

Although the Judge applied the former qualification to the testimony of the first witness, and the latter to the testimony of the People's witnesses, no question of law was thereby presented. The remarks of the Judge, that the testimony of Young did not corroborate that of Wentz, as he swore he did not see Defendant after six o'clock in the evening in question, was a mere statement of the Judge's opinion of the testimony, and was not the subject of an exception. Besides, upon the Defendant's counsel insisting that Young had testified differently, the Judge submitted the entire question to the jury. This would have cured the error, if one had been committed. Upon the return of the jury to the bar, and announcing that they were unable to agree upon a verdict, it was discretionary with the Court either to discharge them or send them back for further deliberation.

It was proper for the Court to inform them that it could see no good reason why they should not agree.

The exception to the testimony of the witness Martin presents the question, whether the confessions of the Defendant to him were voluntary. The Defendant had been arrested, and was confined in jail when the principal confession was alleged to have been made. The witness was a police officer, and went into the room where the Defendant was confined, and told him he was in a bad fix, and had got caught at last, and asked him who the others were, and then the Defendant made the confession.

It is clear that there was nothing like a promise, or any appeal to any hope of favor presented to induce a confession. Nor was there anything like a threat made, in case the Defendant did not

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confess—nothing calculated to interfere with the free voluntary action of the Defendant's mind.

This is all the law requires to render the confession admissible. The inquiry always is, was the confession made under circumstances making it reliable for truth? and if so, it is admissible, irrespective of the means by which it was obtained (The People v. McMahon, 15 N. Y. 384, and cases cited). The remaining exception necessary to examine, it is claimed by Defendant's counsel, presents the question whether, upon the trial of a party indicted for a particular crime, it is competent for the People to prove him guilty of another crime of the same or of a different kind. This question admits of no discussion. It is entirely certain that such proof is inadmissible. Cases may occur where, in order to show the guilt of the party of the offence for which he is upon trial, it may be necessary to give evidence that may tend to show him guilty of another offence of like character. Upon a trial for forgery, to establish the intent, it may be necessary to prove that the Defendant had in his possession, or had uttered, other false or forged instruments. This is not to prove him guilty of another crime, but proof to show him guilty of that for which he is upon trial. The real inquiry in this case is, whether the exception presents this question.

The case states: "I then asked him what was the first fire he was interested in? He said the first fire was his father's barn, that he had anything to do with, and that he and Jerome Dean——"

Objected to, on the ground that it is giving evidence of another offence. No decision of the Court appears to have been made.

The prosecuting attorney at once proposed a different question. This fails to show that any evidence tending to show the party guilty of another offence was given after the ground of the objection was stated.

At another part of the examination of the same witness, he stated: "He told me how he and Dean set the fire." The prosecuting counsel: "How was that?"

The Defendant's counsel objected, upon the ground above

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stated. The Court decided that it was not admissible as independent testimony, and if admissible at all, it was only so as part of a conversation already related; that he thought the evidence was admissible, but as a matter of prudence he would reject it. Then it is manifest that the illegal evidence was not admitted, and did not go to the jury, although at the moment the learned Judge appears to have entertained the erroneous idea that it was competent for a party to prove, by the admissions of his adversary, facts which were not competent to be proved by other evidence, when a part of the conversation in which such admissions were made is admissible. Yet he did not act upon such an idea.

The evidence was excluded; although the jury may possibly have been misled by this idea, and thus induced to give some importance to what had been before proved to have been said by the Defendant in relation to the fire at his father's barn, yet it does not affirmatively appear that they were so misled.

It therefore follows that the exception is not available, upon the ground that the exceptions do not show that evidence was received of another offence, against the objection of the Defendant, properly made.

The judgment must be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

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THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS IN ERROR, v. HENRY F. MORING, DEFENDANT IN ERROR.

Brokers—State Tax on Sales—Statute of 1866—*Construction.*

IN the month of May, 1866, the Defendant was indicted by the grand-jury of the county of New York, for selling as a broker 60,000 bags of coffee, which had been imported from Java, without having executed a bond, as required by the act of the Legislature of the State of New York, passed April 23d, 1866. The facts are more fully stated in the opinion of the Court.

J. H. Martindale, Attorney-General, and *George Bliss, Jr.*, for the Plaintiffs in Error.

Wm. M. Evarts and *Waldo Hutchings* for the Defendant in Error.

HUNT, J.—On the eleventh of April, 1846, the Legislature of the State of New York passed an act entitled "An act in relation to duties on goods sold at public auction, and to the bonds of auctioneers." This act provided that all goods which should be exposed to sale at public auction, should be subject to duties at certain rates specified. The act distinguished between goods of foreign and domestic production, and also between the kinds of goods, by placing different rates of duties upon them. It was provided in the act that the duties should be calculated upon the sums for which the articles should be struck off, and that they should in all cases be paid by the person making the sale. Every person acting as auctioneer was, by the same act, required to file a bond conditioned for rendering faithful accounts, and for the payment of the duties thus required. A failure to give this bond rendered the party liable to a penalty, and to an indictment for a misdemeanor.

On the thirteenth of April, 1866, the Legislature of the State of New York passed another act, entitled "An act to amend chapter

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sixty-two of the laws of 1846, and other acts additional to the same." Chapter 62 of the laws of 1846 was the act I have referred to.

The act of 1866, in effect, amended the act of 1846 by inserting after the words "sold at public auction," the words, "or offered for sale by sample, or otherwise by brokers." It imposed the fees or duties upon sales of the articles therein mentioned, when sales were made by brokers, in the same manner and to the same extent as when made by auctioneers. A further section required the broker to make and file a bond of the same character with that required of the auctioneer, and subjected him to the same penalties in case of a failure to do so.

The Defendant is a merchandise broker in the city of New York, and on the 13th of May, 1866, he was indicted by a grand-jury of that city and county, for selling as a broker 60,000 bags of imported coffee, without having executed the bond required by the act last mentioned, and for neglecting to pay to the State of New York the duties required by said act to be paid upon such sale. The Defendant demurred to the indictment. The Court of General Sessions, in which the indictment was found, sustained the demurrer, and gave judgment for the Defendant.

Upon appeal to the General Term of the Supreme Court of the First District, the judgment of the General Sessions was affirmed. From this judgment of affirmance the People, as Plaintiffs in Error, appeal to this Court.

The demurrer was sustained in the Court below upon the ground that the act of the Legislature of New York in question, was repugnant to the constitution of the United States, and void. It was also held to be in violation of the provisions of section 13 of art. 7 of the constitution of the State of New York, and to be void for that reason. I shall examine these questions only, disregarding some defects and omissions in the framework of the indictment, which, if insisted upon, might be the occasion of technical embarrassment.

The Defendant claims the law in question to be invalid, as being repugnant to that provision of the constitution of the United States which authorizes Congress "to regulate commerce with

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foreign nations, and among the several States, and with the Indian tribes," and also with that provision of the same instrument which declares that "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws" (Art. I., § 8, sub. 3; § 10, sub. 2).

The exaction from the broker of the fees or duties required by the law of 1866, now before us, is claimed by him to be an interference with commerce, and to be a tax or duty upon imports, and so in violation of the constitutional provisions quoted.

These provisions of the United States constitution have been the subject of frequent consideration in the Federal Courts; and in seeking a conclusion in the present case, we are not without the aid of great landmarks to guide us in our way. An examination of the principles of the adjudicated cases will assist us in reaching a correct result in the case before us.

The case of Gibbons v. Ogden (9 Wheaton R. 1) involved the validity of the act of the Legislature of the State of New York granting to Livingston and Fulton the exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years. These acts were adjudged to be in violation of the constitutional provision authorizing Congress to regulate commerce among the States, so far as they prohibited vessels licensed according to the laws of the United States for carrying on the coasting trade, from navigating the said waters by means of fire or steam. In discussing the question, what is this power of regulation, Chief-Justice Marshall says: "It is the power to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. . . . . The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this as in many other instances—as that, for example, of declaring war—the sole restraints on which they have relied to secure them from its abuse.

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They are the restraints on which the people must often rely solely in all representative governments."

This power to regulate commerce is exclusive in Congress, and cannot be exercised by the States (p. 199). Still, there remain to the States the rights so important in their effects upon commerce, and so difficult to distinguish from its regulation, of framing and executing inspection laws, quarantine laws, health laws of every description, and a regulated system of pilotage (pp. 203, 207).

In the case of Brown *v.* The State of Maryland (12 Wheaton R. 419), the leading opinion was delivered by the same learned Judge; and the Court held that an act of the Legislature of the State of Maryland, requiring all importers of foreign goods by the bale or package, and other persons selling the same by wholesale, bale, or package, to take out a license, for which they should pay fifty dollars, and in case of neglect, subjecting them to certain forfeitures and penalties, was repugnant to the section of the United States constitution already quoted, in reference to regulating commerce, as well as to that forbidding the laying of duties or imposts.

The reasoning of the Court is briefly this: An impost or duty on imports is a custom or tax levied on articles imported, or brought into a country. Usually, and to prevent evasions of the law, this right is exercised before the importer is permitted to take possession of the goods. It is none the less an impost, however, when the levy is delayed until the goods are landed. The power to tax immediately upon landing is the same as the power to tax while entering the port. There is no difference between the power to prohibit the sale of an article and a power to prevent its introduction into the country. No goods would be imported if none could be sold. The same power which imposes a light duty may impose one amounting to prohibition. When the importer has so acted on the thing imported that it has become incorporated and mixed up with the mass of property in the country, it loses its distinctive character as an import, and becomes subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original

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form or package in which it is imported, a tax upon it is plainly a tax upon imports, within the prohibition of the constitution. A tax on the sale of an article imported only for sale is a tax on the article itself. I shall have occasion again to allude to certain distinctions contained in this opinion, which will be pertinent to the case in hand.

The three cases against the States of Massachusetts, Rhode Island, and New Hampshire, termed the "*License Cases*," are reported in 5 How. U. S. R. 504. It was there held that a law of Massachusetts, providing that no person shall presume to be a retailer of wine, brandy, etc., in less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first licensed as a retailer of wine and spirits, and that the Commissioners shall not be required to grant such license when in their opinion the public good does not require it, was not inconsistent with any provision of the United States constitution, or any act of Congress under it.

The law of Rhode Island forbade the sale of rum, gin, brandy, etc., in a less quantity than ten gallons, although the brandy which was sold in this case was duly imported from France into the United States, and purchased by the party indicted from the original importer. The law of New Hampshire imposed a similar restriction, although in this case the article sold was a barrel of American gin, purchased in Boston, carried coastwise to Piscataqua, and there sold in the same barrel. These laws were also held to be valid within the provisions of the constitution and laws of the United States.

In these cases the leading opinion was delivered by Ch.J. Taney.

These decisions were placed upon the ground that, although the regulation of commerce with foreign nations and among the several States belonged exclusively to Congress, the regulation of the internal traffic of a State belonged to itself, free from any control or interference on the part of the Federal government.

The doctrine of Brown v. Maryland, that while goods were in the hands of the importer, in the shape in which they were introduced, and in which they were intended to be sold, they were

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not subject to taxation, either by direct assessment or by requiring a license to sell, was reiterated. The laws in question were held not to act upon the article until after it had passed the line of foreign commerce, and become a part of the general mass of the property of the State.

It was decided in Nathan v. The State of Louisiana (8 How. R. 73), that a tax imposed by a State upon all money or exchange brokers was not void for repugnance to constitutional power of Congress to regulate commerce; and this although the business of the Defendant Nathan was confined exclusively to the sale and purchase of foreign bills of exchange.

It was held to be a tax upon the business of the Defendant simply, upon his credit or his capital, and not a charge upon the commerce of the country.

The last case to which I shall refer is that of Almy v. The State of California (24 How. 169). The Defendant Almy was indicted for a violation of a law of the State of California, which required a stamp of a certain value, expressing the amount of the duty, to be attached to any bill of lading for the transportation of gold or silver to any place without the State. The Court held that this was substantially a tax on exports; that a bill of lading, or some similar document, was an invariable accompaniment of shipment, and that a tax upon the instrument was a tax upon the article itself. They say: "The intention to tax the export of gold and silver, in the form of a tax on a bill of lading, is too plain to be mistaken."

The principles to be extracted from these cases are as follows:

1. That the power of regulating commerce with foreign nations, and among the States, and the power of taxing imports or exports, belongs to Congress exclusively.

2. That Congress has no power to interfere with the internal traffic of a State. That authority is vested in the State alone.

3. That imported property, while remaining in the hands of the importer in its original form, cannot be taxed by State authority.

4. That when it leaves the importer's hands, and becomes in-

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corporated with the general mass of the property of the country, it becomes subject to State taxation.

5. That taxation upon the right to sell in any form an article of import, intended for sale, or upon the necessary instrument of exporting an article intended for export, is taxation upon the article itself, and not permitted by the Federal constitution.

6. That the imposition by a State of a tax upon a particular kind of business is constitutional, although the subject-matter of the business related entirely to dealings with foreign countries.

Judged by these principles, I can discover no objection to the legislative acts now under discussion.

Since the year 1784 the Legislature of the State of New York has, from time to time, passed laws taxing the sales of goods by auctioneers. This has been the practice, both as to foreign and domestic goods (Laws 1784, 1 Greenleaf, 64; Laws 1792, 2 Greenleaf, 470).

The constitution of 1821 recognized this practice, and provided for the purposes to which the moneys thus received should be applied (§ 10, art. 7; see Laws 1824, ch. 47; Laws 1838, ch. 52; Laws 1846, ch. 62).

This taxation has been a valuable source of revenue to the State of New York, often reaching to a quarter of a million of dollars annually. During a period of eighty years this right has been unchallenged. The fact that no dispute has been raised upon this point for so long a period of time, is strong evidence that the right cannot be successfully disputed (See Ryan *v.* N. Y. C. R. R. Co., 35 N. Y. 210; Costigan *v.* M. & H. R. R. Co., 2 Denio, 609).

The right to tax sales by auction is fully recognized in Brown *v.* Maryland (supra). The learned Chief-Justice says: "So, if he sells by auction. Auctioneers are persons licensed by the State, and if the importer chooses to employ them, he can as little object to paying for this service as for any other for which he may apply to an officer of the State. The right of sale may very well be annexed to importation, without annexing to it also the privilege of using the officers licensed by the State to make sales in a peculiar way." And again: "It is true, the State may tax occu-

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pations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it." A tax on the occupation of an importer, he says, is prohibited by the constitution.

In Nathan v. Louisiana (supra), Justice McLean, in delivering the opinion of the Court, uses this language: "Under the law, every person is free to buy or sell bills of exchange, as may be necessary in his business transactions; but he is required to pay the tax if he engages in the business of a money or an exchange broker. The right of a State to tax its own citizens for the prosecution of any particular business or profession within the State, has not been doubted. And we find that in every State money or exchange brokers, vendors of merchandise of our own or foreign manufacture, retailers of ardent spirits, tavern-keepers, auctioneers, those who practise the learned professions, and every description of property not exempted by law, are taxed."

The right to tax the proceeds of auction sales, when the articles sold are imported from foreign countries, is not within any of the prohibited principles heretofore stated as drawn from the decisions of the Federal Courts. It may be enforced without a violation of any of them. The importer may reship them to foreign countries if he desires. He may consign his goods to the interior, if he finds it to his interest to do so. He may sell them at his own counter or warehouse for cash or credit. He may exercise every conceivable act of ownership, without restraint or liability to taxation, with a single exception. If he resorts to the mode of a sale at public auction, the sale subjects the auctioneer to the payment of a duty upon the amount of his sales. It seems to me quite extravagant to maintain that this exception is an infringement upon the right to import, or that it imposes a tax upon the business of the importer.

I conclude that the long-existing laws of the State, imposing taxes upon sales by auctioneers, are valid. I am unable to per-

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as if imposed upon the entire property of the State. The section in question is applicable to the same class of taxation, and was never intended to reach a case like the present. Hawkers' and pedlers' fees, canal tolls, railroad tolls, are all taxes in the enlarged meaning of that term, but, I apprehend, not within the meaning of that expression in the section of the constitution under consideration.

Judgment should be reversed, and judgment ordered for the People upon the indictment, with leave to the Defendant to withdraw his demurrer and plead to the indictment within twenty days.

All concur with Judge Hunt, that the act is not in conflict with the constitution of the State.

JOEL TIFFANY,
State Reporter.

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BILL OF EXCHANGE—*Usury—Acceptance by Drawee—Customary Rate of Discount.*] The drawee for whose benefit a draft is drawn and procured to be discounted, and the proceeds of which are paid over to him, is a substantial party to such draft, and liable, independent of any question of acceptance of said draft.
FARMERS AND MECHANICS' BANK *v.* PARKER 302

—— OF LADING—*Advances made in Good Faith to Intended Purchaser.*] Where the master of a vessel, laden with wheat for transportation, according to the custom, gives a bill of lading of the wheat to the parties producing the measure return intended for the purchaser, and the parties so receiving the bill of lading obtain an advance thereon, made in good faith, the parties making such advance acquire an interest in such cargo to the amount of such advance.
This is upon the principle that one purchasing in good faith from a fraudulent vendor acquires a good title.
WESTERN TRANSPORTATION CO. *v.* MARSHALL 366

BILLS AND COIN—Trover and Conversion—Embezzlement . 375
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BOARD OF ASSESSORS—*County Treasurer—Judicial and Ministerial Officers—Assessment Rolls—Mandamus—Relator.*] The duty of assessors in determining the amount to be entered upon the tax roll is a *judicial one.* The duty of the County Treasurer to issue his warrant for the collection of such tax is *ministerial.*
The determination of the assessors is conclusive until set aside by a proceeding legally instituted for such purpose, and it is not within the authority of the County Treasurer to disregard such determination and refuse to issue the proper warrant for the collection of the tax.
The writ of mandamus may in a proper case issue against the County Treasurer, requiring him to issue his warrant, &c., on the relation of a private citizen who has an interest in having such tax collected.
STEPHENS *v.* HALSEY 261

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BOND—*Surety—Public Officers—Enlargement of Duties—Discharge.*]

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When the Legislature enlarge the duties of a public officer, it does not operate to discharge the sureties of such officer from their liability on his official bond.
MAYOR, &c., *v.* RYAN 363

BOND AND MORTGAGE—*Consideration—Findings of Fact—Evidence.*] Where a bond and mortgage is given to secure the payment of a specific debt between the parties, and business transactions continue between them with balances sometimes with the one and sometimes with the other, whether any balances in favor of the mortgagor shall be applied to the payment of the subsisting bond and mortgage is a question of fact depending on the intention of the parties; and unless such intention is expressed or implied from the conduct of the parties, the mortgage lien will continue.
PECK *v.* MINOT 27

BREACH OF CONTRACT—*Contributory Negligence—Measure of Damages.*] Where a steamboat company contracted to tow a canal-boat loaded with staves, &c., to New York, and to give the boat a particular position in the tow, but instead gave it a different and more dangerous position, in consequence of which a portion of the cargo was lost, but which loss would not have happened had the captain and crew of the canal-boat not been guilty of negligence and unskilfulness in the management of the same, the Court held that notwithstanding the breach of contract on the part of the steamboat company, the owner of the cargo, &c., could not recover, because of the negligent and unskilful conduct of his servants and agents in the management of the canal-boat.
MILTON *v.* HUDSON RIVER STEAMBOAT CO. 252

——————— for Sale of Vessel—Measure of Damage . 382
See CONTRACT. 5.

——————— PROMISE—*Evidence—Mitigation—Conduct of Plaintiff.*] In an action for damages for a breach of promise to marry, it is competent to prove any misconduct on the part of the Plaintiff, showing her to be an unfit companion in married life, in mitigation of damages.
Under the general issue in such action it is competent for the Defendant to prove in mitigation of damages that Plaintiff was in the habit of drinking intoxicating liquors to excess.
BUTTON *v.* MCCAULEY 447

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See PARTITION.

CHARTERERS—Master of Vessel—Freight Money—Payment to one of two Claimants—Effect of Trust 235
See FREIGHT MONEY.

CHATTEL MORTGAGE—*Renewal—Filing—Non-residence.*] Where the mortgagor of chattels has sold his interest therein and removed from the State, so as to render it impossible for the mortgagee to comply with the statute to continue the lien by a refiling of the mortgage, &c., the mortgagee must avail himself of his rights against the property within the year, if he would protect himself against subsequent bonâ fide purchasers.

The mortgagor having removed from the State within the year, renders it impossible to refile the mortgage in the office of the clerk, &c., where the mortgagor is then residing.
DILLINGHAM *v.* BOLT 110

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COMMON CARRIER—*Presumptive negligence—Shipping Receipt—Evidence*—Procuring a third party, without examination of the goods, to sign a receipt declaring the packages to be in good order, furnishes no evidence of the condition of the goods at the time of signing such receipt.
HUNT *v.* MICHIGAN S. AND N. INDIANA R. R. CO. . . 103

——— AND SPECIAL CARRIERS—*Distinction defined.*] Where a person, being the owner of a sloop, and not engaged in public transportation, is specially employed to transport a cargo of wheat from one port to another, he is not to be deemed a *common carrier*, but only a *special carrier*, and he is not to be held to the strict accountability of a common carrier.
The distinction between a common and a special carrier defined and commented upon by Parker, J.
ALLEN *v.* SACKRIDER 396

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See GENERAL ASSIGNMENT.

CONDITION PRECEDENT—*Tender, not necessary when it is an idle ceremony—Contract—Construction.*] The law does not impose upon a party the duty of performing an idle ceremony. When it appears in evidence from the party claiming that a tender should have been made to him, that he would not have accepted it if made, to insist that a tender should have been made by the other party is to insist upon an idle ceremony, which the law will not require.
PAINE *v.* BROWN 195

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CONSIGNMENT—*Insurance by Consignee—Ratification by Consignor —Principal and Agent—Non-liability to Insure.*] A consignee or agent for sale is not bound to insure for his principal unless expressly instructed so to do, or unless it is so understood between them.

A contract made for the benefit of the principal, but without his knowledge or consent, may be ratified and adopted by him, whether made in his name or in the name of the agent, whenever brought to his knowledge. The rule is, that a subsequent ratification is equivalent to an original authority.

The contract of insurance is a contract of indemnity, and its real subject is the interest of the person insured in the res; and the terms of insurance, however broad and comprehensive, must be restricted to those interests which the insurance was actually intended to cover.
LEE *v.* ADSIT 336

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——————WILL—Life Estate—Estate in Fee—Statute relative to Bequests 485
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CONSTRUCTIVE FRAUD—*Specific performance—Judicial sale—Election day—Statute, Construction of.*] A judicial sale, although conducted by an officer of the Court, and under its direction, is not the business of the Court within the meaning of the statute providing that "no Court shall be open or transact any business in any city or town on the day of elections, for other than town or militia officers."

But a sale made against Defendant's remonstrance on a day most

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unfavorable to a large gathering, and the lots sold in an order which induces a reasonable belief that it was detrimental to Defendant's interest, and under circumstances giving rise to apprehensions that free competition was interfered with, in equity it will be set aside.
KING *v.* PLATT 19

CONTEMPT—Order to Show Cause—Service—Specific Performance—Judgment 266
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1. CONTRACT—*Specific Performance—Party-walls—Easement.*] The fact that two of the walls of a building are party-walls, each proprietor having an easement in one-half of the wall which stands on the adjoining premises, does not constitute such an encumbrance to the title as to excuse a purchaser of the building and premises from completing his purchase, because of the existence of such easement.
HENDRICKS *v.* STARK 146

——————— Breach of—Contributory Negligence—Measure of Damages 252
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——————— Construction—Condition Precedent—Tender not necessary when it is an idle Ceremony 195
See CONDITION PRECEDENT.

2. ——————— *Entirety—Cancellation—Consideration.*] Where parties to a contract for the purchase and sale of land (a part of the price of which is secured by bond and mortgage on other property) agree to cancel and surrender the contract of purchase, and do so, and nothing is said or mutually understood as to the cancellation of the bond and mortgage, the consideration for which the bond and mortgage were given being cancelled, the bond and mortgage are likewise to be deemed cancelled.
EVELAND *v.* WHEELER 12

3. ——————— FOR SALE OF REAL ESTATE—*Meeting of Minds—Equity.*] A mere proposition to a municipal corporation to sell land and to fix the price thereof by arbitration, and the appointing in the form agreed of arbitrators to fix the price per acre, is not such a meeting of the minds of the parties upon the terms of purchase and sale as to constitute a contract enforcible in equity.
MCCOTTER *v.* MAYOR, &c. 435

4. ——————— FOR SALE OF REAL ESTATE VOIDABLE—*Election of Vendor.*] Where, by the terms of the contract of purchase of real estate, if the vendee fails to make payments at the time they become due, the contract is to be void; and the vendee failing to make his payments, the vendor signifies his election to treat the contract as void by bringing ejectment and recovering possession of the premises, the contract is thereby avoided and the title of the vendee under said contract ceases.
GOODWIN *v.* NELIN 369

5. ——————— FOR SALE OF VESSEL—*Breach—Measure of Damage.*] Where an action is brought to recover damage for a breach of contract, the Plaintiff will not be entitled to recover unless he prove that he has sustained damages.
Where the contract was for the purchase of a vessel at $3,000,

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and the freight thereof, earned upon the trip she was then making, if it was proved on the trial that the vessel and freight together were not worth $3,000, the Plaintiff could not be entitled to recover.
GREENE *v.* WHITE 382

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EJECTMENT—*Evidence of Paramount Title—Description of Lands—Variance.*] A mere probability is not enough to enable the Plaintiff to take the premises in dispute from the Defendant, who holds by a conveyance from the same grantor, and which unquestionably embraces the same premises. The Plaintiff must establish his title affirmatively.
CURTIS *v.* BUTTS 404

2. ——————*Title to closed road—Adjacent owners—Colonial laws.*] The rule of civil law which prevailed in all the colonial provinces of the Dutch was, that no one could claim a present or reversionary title in the soil of a public highway, on the ground that he was the grantee of all lands through which it was laid out.
Plaintiffs owning premises on the west side of the road formerly leading from Jamaica and Flatbush to Brooklyn cannot maintain ejectment for the recovery of the abandoned road-bed, because under the rule of law above stated the legal title to said bed does not accompany the transfer of title of the premises adjoining said road on the west side thereof.
DUNHAM *v.* WILLIAMS 209

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———— CONFLICT OF—*Declarations in absence of Defendant—Lost Note—Parol Proof of Endorsement.*] In an action for goods sold and delivered, upon the question whether Plaintiffs trusted a third party, rather than the Defendant, for the bill of goods, there being a conflict of testimony on that point, it is competent for the Plaintiff to prove that he was informed at the time that said *third party* was untrustworthy, the witness giving him such information.
BRONNER *v.* FRAUENTHAL 116

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——————*Presumption—Knowledge of Contract—Liability of Third Party.*] Mere knowledge by the Defendant, that a party had agreed with the Plaintiff to procure his, Defendant's, notes in payment for property purchased by such party, imposes no liability upon the Defendant.
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EXECUTION—*Sheriff's Liability for Non-return.*] A Sheriff neglecting to return an execution within the time required by law, is, primâ facie, liable for the amount called for on the execution. If he would avoid such liability in any degree he must show that the Defendant in execution had not sufficient personal property whereon to levy the same, or some evidence in mitigation of damage. Failing to do so, it is not error for the Judge to direct a verdict against him.
BROOKFIELD *v.* REMSEN 278

2. —————— *Statutory Exemption—Team of Householders—Joint Debtors and Owners.*] The language of the statute, exempting from levy and sale on execution certain property of the judgment-debtor, should be construed in harmony with the humane and remedial purposes thereof.
Where two householders own a team between them, which, if owned by either individually, would be exempt under the statute, it is likewise exempted as firm property.
STEWART *v.* BROWN 502

3. —————— *Sale in Good Faith—Principal and Surety—Consideration—Liability.*] The assumption of a new liability is a good consideration to constitute the party assuming it a purchaser in good faith.
Where a surety of the parties purchased of them their stock of goods, and agreed to assume their liabilities, and to indemnify them against their indebtedness for the same, his relation as surety for them became changed to that of principal; and that change of relation and new liability furnished a sufficient consideration to constitute him a purchaser in good faith.
As against a purchaser in good faith, an execution does not become a lien on the personal chattels of the debtor until actual levy.
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EXPULSION OF PASSENGER FROM CAR—*Principal and Agent—Obligation to Indemnify—Former Judgment as Evidence—Note of Surety in Satisfaction.*] When the conductor, by obeying the instructions of the railroad company, to enforce the rules and regulations of the company, has been held liable, upon the ground that the company had no authority to make and enforce such rule, he may recover of the company the damage he may have sustained in consequence of such obedience.
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FELONY—*Evidence—Confessions of Criminal.*] Where a prisoner, being arrested and imprisoned on charge of having committed a felony, makes a free statement of his guilt, without any influence having been used to induce the confession, or to interfere with the free voluntary action of the prisoner's mind, such a statement may be used as evidence on the trial of prisoner for the alleged felony.
The remark of an officer to the prisoner, that he was in a bad fix, that he was caught at last, and an inquiry as to who were the others with him, had no tendency to influence the mind of the prisoner improperly, so as to render his confession thereupon inadmissible as evidence against him.
PEOPLE *v.* WENTZ 513

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——————— JURY—Insanity—Province of Court . . 214
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FORECLOSURE — *Original Contract — Usury — Subsequent Taint—Practice—Amendment of Complaint.*] A party claiming to be the victim of usurious exaction cannot avail himself of the invalidity of a later contract to shield himself from liability on one of an earlier date, which was honest and free from vice.

When a new note was given, including as a part of the consideration thereof the amount of a note previously due and unpaid, the fact that the new note was void for usury will not shield the party from the payment of the original note.

FARMERS AND MECHANICS' BANK *v.* JOSLYN . . . 308

2. ——————*Practice — Judgment and Report of Sale—Amendment nunc pro tunc.*] The judgment of foreclosure and the report of sale are proceedings in the same Court, which has authority to amend its proceedings, including its order of sale at any time, nunc pro tunc.

A motion to amend the order of sale after the premises had been sold by the Sheriff of the county, so that it should read, "that the premises to be sold by the Sheriff, &c.," instead of, "by A. B., referee," &c., is in the discretion of the Court.

HOGAN *v.* HOYT 409

3. ——————*Building Associations—Usury—Practice—Findings of Fact.*] This Court cannot go beyond the findings of the Special Term to determine whether the conclusions of law are erroneous. If a party desires to present questions of fact, he must present them through the proper findings of the Judge, referee, or jury.

CITY BUILDING AND LOAN CO. *v.* FATTY 311

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FRAUDS, STATUTE OF—Parol Agreement—Consideration . . 95
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FRAUDULENT REPRESENTATIONS—*Third Party—Evidence of Intent to Defraud.*] Upon the question of intent to commit a fraud by the purchase of goods upon credit, it is competent to prove that the same party made fraudulent purchases from other parties, about the same time: such evidence is deemed proper for the purpose of establishing the intent with which the purchase in question was made.
VAN KLEEK *v.* LEROY 295

———VENDOR—*Bonâ fide purchaser.*] A bonâ fide purchaser for value from a fraudulent vendor acquires a good title.
BARRINGER *v.* HAMMOND 115

FREIGHT MONEY—*Charterers—Master of Vessel—Payment to one of two Claimants—Effect of Trust.*] Where two claimants for the same service apply for payment to the party, bound to pay for such service, and one party is recognized as being entitled and is paid, the other party does not, thereby, acquire any claim upon the party receiving payment, but must still enforce his claim, if he have any, against the party bound to pay for such service.
PATRICK *v.* METCALF 235

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GENERAL ASSIGNMENT—*Conditional preferences—Composition deed—Coercion—Fraud.*] A general assignment of property in trust for the benefit of creditors—to pay, *first*, confidential and accommodation creditors; *secondly*, those creditors who had executed the conditional release, fifty per cent. on their claims; and *thirdly*, the residue of the creditors—is not fraudulent and void as to any class of creditors.
Such a trust, in no sense, operates to hinder or delay creditors in prosecuting their legal remedies against their debtors.
SPAULDING *v.* STRANG 80

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INDICTMENT, REQUIREMENT IN AN—*Larceny—Special Property in Agent—Jurors' Challenge—Interest.*] The distinction between the *commencement* and the *caption* of an indictment stated by Fullerton, J.

"The Jurors of the People of the State of New York in and for the body of the county of Cortland, upon their oaths present," &c., is a sufficient *commencement.*

A *caption* is no part of the indictment, and is only used when the proceedings are removed from an *inferior* to a *superior* court, by error, &c., and it consists wholly of the history of the proceedings in finding the indictment in the inferior court. Thus the history names the *court* where the indictment was found, the *jurors' names* by whom found, and the *time* and *place* of the finding of the same, with such averments as to show regularity and jurisdiction.

A person employed by the superintendent of the poor in a county to purchase provisions for the poor-house, &c., has neither a *general* nor *special* property in the property thus purchased.

The office of superintendent of the poor is a mere agency of the county, and may be considered as having a special property in provisions purchased for the use of the poor. But the actual property is in the county, and, when stolen, should be laid in the indictment as the property of the county.

PEOPLE *v.* BENNETT 32

INJURIES CAUSING DEATH—*Measure of damages—Notes of Testimony—Evidence.*] It is not negligence for a passenger in a car, when there are no seats unoccupied, to attempt to pass to another car for a seat, in obedience to the direction of Defendant's employé.

The question of contributing negligence is one of fact, and belongs to the jury.

In an action for producing death by negligence, &c., the jury must be satisfied that pecuniary injuries have resulted; and if so satisfied, they are at liberty to allow them from whatever source they actually proceeded, and which could produce them.

MCINTIRE *v.* NEW YORK CENTRAL R. R. CO. 1

INSANITY—*Findings of jury—Province of Court.*] On the question of insanity, the judgment of a jury, when guided by the ability and discretion of an enlightened Judge, should not be lightly reversed.

When a decent, quiet, orderly man, meeting with losses of supposed importance to his position in society, abandons his business,

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secretes himself from observation, complains of his head, becomes noisy, obscene, and profane, shouts, sings, and prays, and finally becomes confessedly insane and dies a lunatic, the verdict of a jury, finding him insane from an early period after such losses occur, should not be disturbed for doubtful reasons.
HAVILAND *v.* HAYES 214

INSPECTORS OF PLANK ROADS, Powers of—Turnpikes . 76
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See TRESPASS.

JOINT DEBTORS AND OWNERS—Team of Householders—Execution—Statutory Exemption 502
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————DEMAND—*Severance—Consent of debtor—Statute of Limitations.*] Although, as a general rule, a demand due to several persons jointly cannot be divided, so as to allow the individual interests to be recovered in separate actions, yet it may be done by the agreement or consent of the debtor.
Where there had been an award in favor of two copartners, and the debtor had paid to one of the partners a certain sum in consideration that said partner had released one-half of said award, as being the portion coming to him, held, that the other partner might maintain an action for the recovery of the amount due on said award.
CARRINGTON *v.* CROCKER 230

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LEASE—*Assignment—Covenant to pay Rent.*] The assignment of a lease to a third party, after a portion of the rent thereon has become due, does not discharge the lessee from his covenant to pay rent due to the lessor.
PHELPS *v.* VAN DUSEN 399

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LESSEES OF WHARF—*Possession—Damage—Negligence.*] In order to maintain an action against a lessee of a public wharf in the city of New York, for damage sustained by the Plaintiff by reason of the lessee's neglect to keep such wharf in good repair and safe for public use, it is not necessary to show the Defendant in exclusive possession of such wharf. It is sufficient to show that Defendant accepted the lease and exercised rights under it.
RADWAY *v.* BRIGGS 98

LETTER OF CREDIT—*Acceptance of Draft—Extrinsic evidence—Form of Complaint.*] Extrinsic evidence is competent to enable the Court to understand the purpose for which a draft was made, and to interpret and apply its language.
Where the Defendant enters into an arrangement with other parties to the effect that a draft is to be drawn upon him on time, and is to be discounted and the avails thereof paid over to him, and for that purpose writes a letter of credit to be used in procuring the discount, he is to be deemed the borrower, and is liable for the proceeds thereof coming to his hand, independent of the question of acceptance.
BARNEY *v.* WORTHINGTON 105

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MANDAMUS—*Appointment of County Papers by Boards of Supervisors.*] Persons publishing and printing the laws, as provided by chapter 280 of the Laws of 1845, are not entitled to compensation therefor unless they have been appointed, by the Supervisors of the county, printers to so publish and print the laws.
DEL VECCHIO *v.* SUPERVISORS OF KINGS CO. 390

——————— *Commissioners of Highways—Powers and Duties—Application for New Road.*] The question whether two applications made to the Commissioners of Highways were in reality but one application, the latter intended as a correction of the former, is one of fact, to be determined by the finding of the Court below, with which the Appellate Court has nothing to do.
The Commissioners of Highways, in laying out a new road, may locate it in part upon an old road-bed. The principle which will authorize the intersection or crossing of an old road by a new one embraces the whole ground of locating a new road upon an old road-bed.
THOMAS *v.* COMMISSIONERS OF HIGHWAYS OF MILTON . . 358

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MARINE INSURANCE—*Exceptions in Policy—State of Civil War—Historical Facts as Evidence.*] To create belligerent rights it is unnecessary that there should be war between independent powers. They may exist between parties to a civil rebellion.
A civil war exists whenever the regular course of justice is interrupted by revolt, &c., so that the Courts cannot be held open.
On the 21st of April, 1861, a civil war existed in Norfolk, Virginia, and the taking of Plaintiff's vessel under the pretended authority of Virginia, and loading the same with stones, and sinking the same, to obstruct navigation, was one of the acts of such war, and caused the loss to fall within the exceptions of the policy of insurance.
Matters of public history affecting the whole people, Courts will take judicial notice of, and will resort to such documents as may be at hand and be worthy of confidence.
SWINNERTON *v.* COLUMBIAN INSURANCE CO. 159

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MARRIED WOMEN — *Separate Estate — Liability — Deficiency on Foreclosure — Contracts — Statutes of* 1848 *and* 1849.] The effect of the Married Women's Acts of 1848 and 1849 is not to remove the general disability of married women to bind themselves by their contracts, but to enable them to hold to their separate use, and to convey and devise their real and personal estate as if unmarried, substantially in the manner and to the extent previously authorized by the rules of equity.

The principle is, that under such acts the married woman may charge her separate estate for any debt she may contract on the credit of, or for the benefit of her separate estate.

BALLIN *v.* DILLAYE 69

MASTER OF VESSEL — *Contract for Services — Lien — Condition precedent.*] The master of a vessel has no lien on the vessel for his wages; he contracts upon the credit of the owners thereof. Per Davies, J.

The doctrine of mariners' contracts, seamen's wages, &c., that freight is the mother of wages, does not apply to the contract of the master for wages.

Where the master was engaged for a round voyage, and the vessel was lost, held, that the Captain could recover wages only for the time employed as master of the vessel; and that the breaking up of the voyage by the loss of the vessel, terminated his employment as Captain, and that he could not recover for wages after that time.

JENKINS *v.* WHEELER 450

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PAROL AGREEMENT—*Consideration—Statute of Frauds.*] A verbal promise to sell goods to a responsible party, upon the usual terms and for full value, forms no consideration for an independent engagement to pay the antecedent debt of a third party.
PFEIFFER *v.* ADLER 95

——— EVIDENCE—*Explanation or Contradiction of Receipt—Payment by Note—Fraud.*] A receipt may be contradicted or explained by parol evidence.
BUSWELL *v.* POINEER 245

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PARTITION—*Jurisdiction—Chancery Practice—Res adjudicata—Statute of Uses and Trusts—Motion to compel Purchaser to take title.*] A judgment in partition is binding upon the parties, if the Court had jurisdiction of them, and of the subject-matter of the action.
The Supreme Court is one of general jurisdiction in law and equity, and has jurisdiction of all actions for partition, and it is its proper province to decide whether a partition or sale of the property is most advantageous, &c.
Where, in such action for partition, all persons interested were made parties, and the Court adjudged that partition should be made by a sale of the property, and in pursuance of such order the property has been sold, no party to the action can object to the title of the purchaser under such proceedings, so long as the judgment of the Court remains in force.
CLEMENS *v.* CLEMENS 50

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PRACTICE—*Adjustment of Costs—Non-appealable Order—Judgments against Municipal Corporations—Statute in relation to Costs.*] An appeal does not lie to this Court from an order of the Supreme Court adjudicating costs.

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The law of 1859 (ch. 262, § 2), providing that no costs, fees, disbursements, or allowance shall be recovered or inserted in any judgment against municipal corporations, unless the claim upon which such judgment is founded shall have been presented for payment to the chief fiscal officer of such corporation before the commencement of an action thereon, does not apply to a cause of action arising ex delicto.
McCLURE *v.* SUPERVISORS OF NIAGARA CO. 275

2. PRACTICE—*Referee's Report—Findings of Fact.*] An exception that a referee has not found specifically upon certain questions of fact is not well taken. A referee is required to find upon issues only, and not upon evidence.
WILTSIE *v.* EADDIE 481

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3. —————— ON APPEAL—*Undertaking—Surety—Liability on Affirmance as to one Defendant.*] The conditions of an undertaking on an appeal from a judgment against two Defendants, Appellants, being that the sureties should be liable on condition that the judgment on appeal should be affirmed; and the judgment on appeal was affirmed as to one of the Defendants, and reversed as to the other. Held, that the sureties were liable the same as though the judgment had been affirmed as to both.
SEACORD *v.* WARRIN 319

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PRESUMPTION—Evidence—Knowledge of Contract—Liability of Third Party 192
See EVIDENCE. 2.

PRESUMPTIONS—Quo Warranto—Religious Corporations—Election of Officers 154
See RELIGIOUS CORPORATIONS.

PRINCIPAL AND AGENT—*Corporation—Director—Notice.*] Wherever the very act of the agent is authorized by the terms of the power, and the act is in itself warranted by the terms used, such act is binding on the principal as to all persons dealing in good faith with the agent. In such case the *apparent* authority is the *real* authority.

Notice to a director of a bank that a note discounted by the bank is an accommodation note, is notice to the bank only in cases where the director was acting as the agent of the bank at the time of the notice.

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It is upon the principle that the agent stands in the stead of the principal only while acting as his agent.
WESTFIELD BANK *v.* CORNEN 442

PRINCIPAL AND AGENT—Consignment—Insurance by Consignee—Ratification by Consignor—Non-liability to Insure . . 336
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See EXPULSION.

——————————SURETY—Execution—Sale in Good Faith—Consideration—Liability 314
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PROOF, PAROL, OF ENDORSEMENT—Lost Note—Conflict of Evidence—Declarations in Absence of Defendant . . . 116
See EVIDENCE. 1.

PROMISE, BREACH OF—Evidence—Mitigation—Conduct of Plaintiff 447
See BREACH OF PROMISE.

PROMISSORY NOTE—*Payment—New Note—Pleading—Answer—Counterclaim.*] The giving of a new note by one of two joint and several makers, intended as a provision for the payment of their former note, not agreed to be taken as payment and not in fact paid, constitutes no defence to an action upon the original note.
BATES *v.* ROSEKRANS 332

2. ——————————*Failure of Collector to Protest—Liability.*] Where the American Express Company had undertaken to present a promissory note to the maker thereof for payment, or procure it to be protested, and neglected or refused so to do, by means of which one of the endorsers of such note was discharged from his liability as endorser, held, that the Express Company was liable for such omission to present the note for payment and procure it to be protested.
COGHLAN *v.* DINSMORE 386

3. ——————————*Usury—Bonâ fide Holder.*] It is not usurious for an agent of the maker of a promissory note, or one acting as such, to procure the note of his principal to be discounted at a lawful rate of interest, and, without any agreement to that effect, to return a portion of the proceeds of such note, paying over the balance.
Whether the agent discounted the note for his principal at a usurious rate before procuring it to be discounted at the bank is a question of fact to be ascertained by the jury, and not to be assumed by the Court on a trial before a jury.
CHATHAM BANK *v.* BETTS 400

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PROVISIONAL REMEDIES—*Arrest—Judgment defined.*] An order of arrest in a proper case may be made during the progress of a trial, and before a final judgment settling the rights of the parties thereto. But a judgment so modified as that an execution cannot be issued to enforce it, until after further adjudication, is not such a judgment as will prevent the making the order of arrest as one of the provisional remedies which may be necessary for the security of the Plaintiff.

Where a judgment had been entered on the default of one of the Defendants, and such Defendant subsequently appeared by attorney and procured an order for him to serve Plaintiffs with an answer within ten days, and the judgment by default to stand as security, held, that the judgment so modified was not such a judgment as to prevent the granting of an order for the arrest of Defendant pending the trial upon the issue raised by his answer.

MOTT *v.* UNION BANK 291

PURCHASER, BONA FIDE—Fraudulent Vendor 115
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——————— Sale and Delivery—Title in Vendor—Fraud of Vendor 184
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RELATOR—Mandamus—Board of Assessors—County Treasurer—Judicial and Ministerial Offices—Assessment Rolls . . . 261
See BOARD OF ASSESSORS.

RELIGIOUS CORPORATIONS—*Election of Officers—Quo warranto—Presumptions.*] In an action in the nature of a quo warranto, those who hold the certificate of election to the office, and who are in possession of the office, are to be presumed rightfully and legally in possession. The presumptions are that the presiding officer did his duty in receiving the votes, counting them, and giving the certificate of election. To overcome this presumption, the Relator must show by proper evidence the contrary to be true, &c.
LANCHANTIN *v.* LACOSTE 154

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ROAD, TITLE TO CLOSED—Ejectment—Adjacent Owners—Colonial Laws 209
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SALE AND DELIVERY—*Title in Vendor—Bonâ fide Purchaser—Fraud of Vendor.*] A contract to build and deliver railroad cars to Plaintiffs at certain times and places, &c., does not vest the title to such cars in Plaintiffs until such cars are delivered and accepted.

A sale and delivery of such cars to a party purchasing in good faith, before delivery to Plaintiffs, transfer to the vendee a good title.

A subsequent payment for such cars by Plaintiffs, on the fraudulent representations of the maker of the cars as to the completion and delivery of the same according to the terms of the contract, will give them no title as against a bonâ fide purchaser.
OHIO AND MISSISSIPPI R. R. CO. *v.* KASSON 184

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SPECIAL AND COMMON CARRIERS—Distinction Defined . 396
See COMMON AND SPECIAL CARRIERS.

SPECIFIC PERFORMANCE—*Judgment—Contempt—Order to show cause—Service.*] In an action to compel a specific performance of an agreement, when an order has been made requiring the party, at a certain time and place, to make out the necessary conveyance, &c., and the party has failed to comply with such order, a further order to such party, to appear and show cause why he should not be proceeded against as for a contempt, is a proceeding in such action; and service of such order is well made upon the attorney of such party in such actions.

There is a distinction between proceedings against a party for a criminal contempt, and proceedings as for a contempt for the purpose of enforcing any civil right or remedy.

PITT *v.* DAVISON 266

——————————— Constructive Fraud—Judicial Sale—Election Day—Statute, Construction of 19
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——————————— Contract—Party-wall—Easement . 146
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STATE TAXATION—*Savings Banks—Act of* 1866—*Surplus—U. S. Securities—Exemption.*] The seventh section of the act of 1866 (vol. 2, p. 1647) provides for the taxation of the franchises of savings banks, or institutions; and provides a means by which to determine the amount upon which they are to be taxed, to wit, not exceeding the surplus earned and owned by such institutions.
MONROE COUNTY SAVINGS BANK *v.* CITY OF ROCHESTER . 473

STATUTES OF 1848 AND 1849—Contracts—Married Women—Separate Estate—Liability—Deficiency on Foreclosure . . 69
See MARRIED WOMEN.

STATUTE AS TO SET-OFF—*General Assignment—Obligation of Assignor.*] Where an action is brought by an assignee for the benefit of creditors, upon claims of the assignor against Defendants, such Defendants cannot set off on trial a demand evidenced by a promissory note not due at the time of the assignment.
Under the Code, in an action brought by an assignee, the Defendant can set off no demand against the assignor which was not the subject of a legal set-off at the time of the assignment.
MARTIN *v.* KUNZMULLER 464

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STATUTORY EXEMPTION FROM EXECUTION—Team of Householders—Joint Debtors and Owners 502
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—————— RIGHT—*Assignment of Courts and Judges—Place of holding Court—Adjournment of Term.*] The Court of Oyer and Terminer cannot lawfully be held at any place other than that determined upon by the Judges of the Supreme Court, communicated to the Secretary of State, and published in the State paper, in pursuance of the statute in such case made and provided.
A trial and conviction of a person of a felony at a Court held in the town of Bedford, when White Plains is the place legally designated for holding such Court, is without authority and erroneous.
NORTHRUP *v.* PEOPLE 177

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TAXATION — *Powers of Legislature — Municipal Officers.*] The people have not ordained that taxation shall be general, so as to embrace all persons or all taxable persons within the State, or within any district or territorial division of the State, nor have they forbidden that it shall be apportioned according to the benefits which each taxpayer is supposed to receive from the object on which the tax is expended.

The Legislature have authority to authorize a city to make an apportionment of a tax upon the profits of persons benefited by an improvement made, and for which the money had been expended, even though the city had paid for the improvement, and sought to raise the money by a tax to reimburse the corporation.
HOWELL *v.* CITY OF BUFFALO 505

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TREASURER, COUNTY—Board of Assessors—Judicial and Ministerial Officers—Assessment Roll—Mandamus—Relator . . 261
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TRESPASS—*Tenants in common—Joinder of parties—Demurrer—Answer.*] In an action to recover damages for an injury done to the possession of lands held by tenants in common, all co-tenants must be joined as parties Plaintiff, &c.

If in such action there is a non-joinder of parties Plaintiff, which appears upon the face of the complaint, advantage thereof can only be taken by demurrer.

Where, in such case, a demurrer is interposed, and is overruled by the Court, the Defendant should appeal; if he answer, he abandons his demurrer, and cannot afterward have the benefit of it on appeal.

To set up by answer a defence which the Code requires to be by demurrer is a nullity, and cannot be made available.

DEPUY *v.* STRONG 239

TROVER AND CONVERSION—*Bills and Coin—Embezzlement.*] In an action to recover damages for money of Plaintiff's embezzled by Defendant, it is not necessary to prove the specific money in gold or bank bills embezzled to entitle the Plaintiff to recover. It is sufficient to show the money taken to be the Plaintiff's money; also the amount taken, and the felonious taking of it by Defendant.

Money is as much the subject of conversion as any other description of personal chattels. The admission by the Defendant that the money was the property of the Plaintiff, and that he had

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taken a certain amount, furnished sufficient evidence to entitle the Plaintiff to recover.
GORDON *v.* HOSTETTER 375

2. TROVER AND CONVERSION—*Evidence of Value—Plaintiff's Evidence of Cost—Rebuttal.*] When the Plaintiff attempts to establish the value of property converted by his own mere opinion of value under oath, it is competent to show that at two sales of the property prior to the commencement of the action a much less value was attached to it.
It is also competent to show the value of other articles included in the bill of purchase, for the purpose of showing the estimated value of the property converted at the time of its purchase by the Plaintiff.
WELLS *v.* KELSEY 328

TRUST—*Incorporation—Director.*] One holding a position of trust cannot use it to promote his individual interest by buying, selling, or in any manner disposing of the trust property committed to his care.
A director of a plank-road company, who is likewise the secretary and treasurer of the company, cannot, as director, vote himself extra compensation as secretary and treasurer, without infringing the above principle.
BUTTS *v.* WOOD 432

——— EFFECT OF—Freight Money—Charterers—Payment to one of two Claimants 235
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TURNPIKES—Plank-roads—Powers of Inspectors 76
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UNITED STATES SECURITIES—*Certificates of Indebtedness not exempt from local Taxes.*] Certificates of indebtedness, issued in pursuance of the Act of Congress of March 1, 1862, are not exempt from taxation by State or municipal authority.
A Congressional declaration of exemption from taxation adds no force to that which is the subject of constitutional exemption. Whatever subject is constitutionally exempt from taxation, is so without legislative declaration, and a legislative declaration of exemption of subjects not constitutionally exempted, is of no validity.
NATIONAL BROADWAY BANK *v.* MAYOR, &c. 124

2. ——————————*Legal Tender Notes not Exempt from Local Taxes.*] Legal Tender Notes, issued under the

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Act of Congress of February 25, 1862, are not exempt from State or Municipal Taxation.
BANK OF NEW YORK *v.* SUPERVISORS OF NEW YORK . . 136

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WHARFAGE—*Abandonment of Wrecked Vessel to Insurers—Liability—Damage for Obstructing Wharves and Piers.*] When a vessel, lying at a wharf in the city of New York, takes fire and sinks to the bottom, and is then and there abandoned to the insurers, who accept the abandonment, they do not thereby incur any responsibility for the obstruction occasioned by the sinking of such vessel, nor are they under any obligation to the public to remove the same.

No action can be maintained by a lessee of the corporation entitled to wharfage or shippage against the underwriters for damages occasioned by such obstruction by the sinking of the vessel.

TAYLOR *v.* ATLANTIC MUTUAL INSURANCE CO. 279

WHARF, LESSEES OF—Possession—Damages—Negligence . 98
See LESSEES.

WILL, CONSTRUCTION OF—*Life Estate—Estate in Fee—Statute relative to Bequests.*

HARRIS *v.* AMERICAN BIBLE SOCIETY 485

2. —— *Devise—Remainder—Issue—Children and Grandchildren.*] The testator gave certain property to his daughter, Mrs. Prowitt, during her life, and, after her death, "to such children as should be living at the time of her death." Held, under the circumstances of the case, that this expression was not limited in its effect to the immediate offspring of Mrs. Prowitt, but included remoter descendants or grandchildren.

The expression "children then living" may mean "lawful issue," or remoter descendants, if such was the intention of the testator, to be gathered from other parts of his will. In the case of a contingent future gift to the children of a first taker, followed by a limitation over for want of such, the presumption is in favor of the first taker's posterity, to his remoter descendants, in preference to the donee over.

PROWITT *v.* ROBINSON 412

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